

THE PATIENT SELF-DETERMINATION ACT

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The Omnibus Budget Reconciliation Act (OBRA) of 1990,² signed into law in November of 1990, included substantive new law that has come to be known as the Patient-Self Determination Act and which largely became effective on 1 December 1991.³

Because of the format of the OBRA (amendments to existing sections of Title 42 of the U.S. Code, as well as the addition of complete sections), it is impossible to set forth, with reasonable brevity, the actual text of the Patient Self Determination Act. Its primary provisions can, however, be noted and explained.

The Patient Self-Determination Act applies to hospitals, nursing facilities, providers of home health care or personal care services, hospice programs and health maintenance organizations that receive Medicare or Medicaid funds. Although its primary purpose is to assure that the beneficiaries of such care are made aware of advance directives and are given the opportunity to execute directives if they so desire, it is broader than that: it addresses the right to autonomous medical decision-making.

Covered organizations are required to provide each patient or resident with: 1) information, tailored by state, explaining the right to accept or refuse medical care and to execute an advance directive; and 2) information concerning the policies of the provider or organization with respect to such rights. The law requires the provider or organization to document the existence or absence of an advance directive in the record of each patient or resident but does not actually require that such document be included in that record, if, in fact, one has been executed.

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²Public Law 101-508.

³The Secretary of the Department of Health and Human Services was required within six months of passage of the Act to: (a) develop and implement a plan to inform the public of the option to execute advance directives; (b) develop and distribute to Medicare and Medicaid providers pertinent materials of national applicability; (c) assist state agencies or private entities in developing appropriate state-specific materials; and (d) to add an explanatory page to the handbook mailed to Social Security recipients.

The law even sets forth the situation, or time, under which this information is to be provided. In hospitals and nursing facilities, it must be provided at the time of admission; in the case of a home health care or personal care service organization or hospice, it must be provided before care is undertaken; and, in the case of an health maintenance organization, it must be provided prior to enrollment.

Each state is responsible for developing written descriptions of its laws concerning advance directives, including both living wills and durable powers of attorney, whether recognized by statute or case law or both. These explanations must then be distributed by the states to all covered providers and organizations within their borders.

The law also states that covered providers and organizations must: (a) comply with the applicable state law regarding advance directives; (b) not condition care on the execution of, or failure to execute, a directive; and (c) provide for the education of members of their staffs and of their communities with regard to the subject of advance directives.⁴ No rules or guidelines are given with regard to this required community education.

Most interestingly, the law does not specifically require that covered providers and organizations give their patients or residents the opportunity to execute advance directives. Individuals writing about the Act in health care and legal journals have, however, almost universally assumed that this is a requirement and, indeed, it seems to have been the intent of the Act.

Because the Act is limited to organizations and providers that accept Medicare and Medicaid funds, strictly speaking, it does not apply to most federal facilities--prison hospitals, Department of Defense hospitals, and Department of Veterans Affairs hospitals and domiciliary care facilities.

⁴It is specifically stated that state laws which permit a health care provider to refrain from carrying out the terms of an advance directive if doing so would violate his or her own conscience will remain effective.

However, its requirements have, in large part, been incorporated by the Joint Commission on the Accreditation of Healthcare Organizations⁵ and, consequently, apply to all federal facilities that seek accreditation by the Joint Commission.

⁵Comprehensive Accreditation Manual for Hospitals: The Official Handbook, Chicago, IL, current edition. See 'Patient Rights and Organizational Ethics,' Standard RI. 1,2,4, pg RI 11-12.

