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New Protections for Religious and Moral Beliefs in Health Care

Final rules (https://www.stradley.com/-/media/files/publications/2019/05/final-conscience-rule.pdf?la=en&hash=BE8E484A1B04D7290B482FF4379F8707) from the U.S. Department of Health and Human Services on the enforcement of conscience protections for health care providers were announced on May 2 with an effective date to follow 60 days from publication in the Federal Register. The regulations from the Department's Office of Civil Rights (OCR) attempt to put in place a broader framework for enforcing the roughly two dozen existing laws that protect the religious beliefs of health care workers. Office of Civil Rights Director Roger Severino cited an uptick in conscience-related complaints that spurred the new protections, with complaints nearly tripling in the past year. The rules have already been challenged in litigation.

The most recent rules reflect a long history of administrations and politicians on both sides of the aisle who have supported conscience protections for health care providers. Among the earliest of these were the Church Amendment, named for its sponsor Sen. Frank Church and passed during the 1970s to ensure hospitals would not lose government funding for refusing to provide services or facilities for abortions or sterilizations based on religious beliefs or moral objections. Subsequently added protections include the Coats-Snowe Amendment, which protects a "health care entity," including physicians and those training for health professions, from discrimination for refusing to perform or provide referrals for abortion services, and the Weldon Amendment – annually included in appropriations since 2004, which prohibits the use of federal funds to discriminate against any institutional or individual health care entity because it does not provide, refer or pay for abortions. Additional conscience protections, including for objections to assisted suicide and euthanasia, have been more recently included in the Affordable Care Act and various Medicaid and Medicare statutes.

However, approaches to enforcing these statutory protections have differed widely over time as each administration navigates potential conflicts in putting the protections into practice. Both the Bush and Obama administrations released significantly different rules on the scope of the protections. The current rules reflect a return to the 2008 protections that were rescinded in 2011. In the intervening years, state statutes have increasingly tried to mandate health care services for the purposes of providing broad health care coverage and preventing discrimination.

The result has been a marked increase in litigation attempting to compel health care entities to provide specific services in violation of their religious beliefs or moral objections. Within the past five years, examples of this have included suits over religious refusals to provide abortion and sterilization procedures in violation of religious directives. *See Means v. U.S. Conference of Catholic Bishops,* No. 1:15-CV-353, 2015 WL 3970046 (W.D. Mich. 2015) (abortion); *ACLU v. Trinity Health Corp.,* 178 F. Supp. 3d 614 (E.D. Mich. 2016) (abortion); *Chamorro v. Dignity Health,* No. 15-549626 (Cal. Super. Ct. Dec. 28, 2015) (sterilization). Even where health care systems have attempted to make accommodations

by referring procedures from entities with objections to non-objecting entities in the same system, litigation has ensued to compel objecting health care providers to provide services in violation of religious beliefs and over moral objections. *See Minton v. Dignity Health,* No. 17-558259 (Cal. Super. Ct. April 19, 2017) (appeal pending Cal. App. 1st District).

While the new rule is generally a return to the 2008 regulation, it defines key terms in the regulation more comprehensively than the earlier regulations, as well as requires a more detailed compliance certification to document the rule's enforcement. Most of the new definitions broaden the scope of individuals and entities entitled to exercise conscience protections and expand the actions that can be subject to religious or moral objections. Items of particular note in the new rule are:

- Protections to those who "assist in the performance" of a procedure are now defined to include anyone with a "specific, reasonable, and articulable connection." By definition, this includes counseling, referrals or making arrangements for a procedure connected to a religious or moral objection. Comments on the rule anticipate this could extend to those scheduling an appointment or preparing a facility, but OCR expects that the "reasonable" and "specific" requirements will limit vague objections to actions only loosely connected to the objected-to procedure. For example, while the rule does extend protections to ambulance drivers and paramedics as health professionals whose services may have a reasonable and specific connection to the end-point health service, the guidance makes clear that "mere speculation that an objected-to service may occur" would not be sufficient.

- Protected entities vary by the statute being enforced, but they include both individual health professionals and those in training for health professions, and hospitals, laboratories, biomedical research programs, pharmacies, health insurance issuers, plans, plan sponsors and third-party administrators. Comments released with the final rule also make clear that, unless otherwise required by statute, there is no requirement that employees provide prior notice of religious beliefs or moral convictions to receive protections.

- Compliance with the rule will require recipients of federal funds to provide assurances of compliance for the approval, renewal or extension of funding. Entities are required to keep documentation of compliance for three years, including any relevant policies, procedures, statements and records of accommodation requests.

While the regulation does try to tie together conscience protections from many disparate statutes, its implementation is intended to remain limited to the circumstances covered by the existing statutes. For example, the new rule does not provide any additional substantive conscience protections concerning vaccinations, although it does enforce compliance with state laws that provide for religious or other objections to vaccines. Guidance on the rule also indicated that, while penalties for violations may extend as far as terminating funding for organizations, there is no requirement to terminate funding, and specific remedies will depend on the facts and circumstances of the violation.

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The new rules have already drawn litigation. The city of San Francisco filed suit (https://www.stradley.com/-/media/files/publications/2019/05/sf-v-hhs.pdf?la=en&hash=6B3EB1D9359BFAB2C81F3A593E105ACF) on the day of the announcement, claiming the resulting rule is discriminatory based on excessively broad definitions. San Francisco also would potentially lose funding for health care programs because there is a direct conflict between the new rule and the San Francisco public health system policies that require medical personnel to participate in medical procedures despite moral, religious or ethical objections when required by a patient's needs. The suit raised issues of potential discrimination by individuals claiming religious objections and onerous documentation issues. The lawsuit is likely to be joined by others in the coming months. By contrast, religious health care organizations and health professionals have voiced their approval for broader and clearer protections for their specific faith-driven approach to health care.

In the meantime, existing litigation related to state statutes and religious objections remains to be resolved, and more challenges to the new federal rules are sure to follow. The practical effect of the regulations will likely unfold over the course of the rest of the year, and it would not be surprising for challenges eventually to reach the U.S. Supreme Court. In the increasingly difficult political environment, common ground seems elusive, and health care providers will need to be alert to further developments. ■