

Defending the Federal “Provider Conscience Regulation” *Questions and Answers*

(See page 5 for what you can do today to defend the “Provider Conscience Regulation.”)

What is the “Provider Conscience Regulation?”

This regulation was proposed by the U.S. Department of Health and Human Services last August and took effect in January 2009. It implements and enforces three longstanding federal civil rights laws that protect individual and institutional health care providers from discrimination based on their moral or religious objections to performing or referring for abortion, or including abortion in employee health insurance plans.

What do these federal laws guarantee?

The oldest law (the Church Amendment¹) was enacted in 1973 and helps ensure that health care personnel with moral or religious objections to abortion or sterilization (or in some contexts, other medical or research activities) are not discriminated against by entities receiving certain federal grants. It also forbids health care entities that receive certain federal grants or contracts to discriminate in training and employment against health professionals or applicants for study because they are willing *or* unwilling to participate in abortion or sterilization.

The second law (Coats-Snowe Amendment – Public Health Services Act²), enacted in 1996, forbids federal agencies, and state or local governments receiving federal funds, to discriminate against health care providers and health training programs because they do not provide abortion or abortion training.

The third law (the Weldon Amendment³), part of the Labor/HHS/Education appropriations bill every year since 2004, forbids federal funding under that bill for government bodies that discriminate against health care providers and insurers not involved in abortion.

If these laws already exist, why is the regulation necessary?

While the laws have been in effect for as long as 36 years, some state government officials as well as some professional societies and advocacy groups still attack provider conscience rights as though they don’t exist (see below) – and many health care providers do not even know that they have these rights.

What does the “Provider Conscience Regulation” do?

The regulation coordinates and incorporates the various statutory requirements related to conscience rights, allows for greater clarity and awareness of the statutory protections, greater ease

¹ 42 USC § 300a-7

² 42 USC § 238n

³ P.L. 110-161, Sec. 508(d), 121 Stat. 1844, 2209 (2008)

of administration, and a uniform mechanism for investigating complaints, resulting in greater compliance with the law.

The regulation is similar to HHS regulations that raise awareness of and enforce other important federal civil rights laws. For example, under Title VI of the Civil Rights Act of 1964, when an entity elects to receive any amount of federal funds, that entity certifies that it will follow all federal conditions and rules that apply to the use of those funds.

Is there evidence of discrimination against provider conscience rights? ---

Unfortunately, yes. During the past decade some professional accrediting agencies, state legislators, state regulators, state attorneys general, and “pro-choice” organizations have ignored, undermined or attacked provider conscience rights and laws. For example⁴:

- In April 2000, members of the California Medical Assistance Commission (CMAC) attempted to force Catholic hospitals to provide abortion and other reproductive services as a condition of receiving a Medi-Cal (Medicaid) contract.
- In 2003, two bills were introduced in the New York legislature (A. 4945 and S. 4031) to allow the state health commissioner in licensing decisions to discriminate against hospitals that do not participate in abortion.
- In 2008, more than 50 so-called “pro-choice” organizations issued guidance to newly elected president Obama in ***“Advancing Health and Reproductive Rights in a New Administration: Steps for the First 100 Days.”*** Among other things, the document urged the president to: a) include in his first budget a repeal of the “Weldon Amendment,” and b) take immediate steps to repeal the HHS “Provider Conscience Regulation.” If successful, these actions will make it easier for such groups to pass state laws that discriminate against health care providers based on their moral objections to providing or referring for abortion.
- In 2009, a member of the state agency that oversees Massachusetts’ subsidized health insurance program objected to including a faith-based provider in the program because it does not provide abortion. The state agency was either unaware or unconcerned that this action violated the provider’s civil rights under federal law.
- In 2009, a bill (HB 2354) is pending in the Illinois State Legislature that would require physicians who object to abortion on moral or religious grounds to refer for them. Similar legislation affecting pharmacists is pending in the California State Legislature (AB 120 and SB 374).

Isn’t the religious freedom of health care providers protected by the Constitution? ---

Yes, but since the U.S. Supreme Court’s 1990 decision *Employment Division v. Smith* that protection is limited. The Court ruled that if a law serves a legitimate government interest and is generally applicable (i.e., is not directed against a religion), even a religious institution might not be exempted from the law’s requirements for religious reasons. The Court has said that if lawmakers want such exemptions they must write them into law. Hence there’s a greater need than ever for laws protecting conscience, and for vigorous enforcement of laws already in place.

⁴ For a more extensive list of actual and attempted discrimination against conscience rights, please see the Primer on federal conscience laws and regulations at: www.thealliance.net.

Are the federal laws on which the regulation is based also in danger of being repealed? _____

Yes. As noted above, a large number of influential advocacy organizations are urging the Obama Administration and Congress to repeal or modify the conscience laws. The Weldon Amendment is the most vulnerable of these civil rights laws as Congress could repeal it later this year by not including it in the next Labor/HHS/Education Appropriations bill.

If Congress repeals the Weldon Amendment, some states may compel health care providers to choose between practicing their chosen professions or violating their consciences; or, in the case of Catholic health care, choosing between operating its hospitals as Church ministries or as secular institutions – or otherwise engaging in civil disobedience.

What effect will rescission of the regulation have? _____

Rescinding the regulation will not repeal the federal conscience statutes on which it is based; only Congress can do that. However, rescission will have other detrimental effects:

- 1) It will reduce awareness of the federal conscience laws, their requirements, protections and responsibilities among the public, recipients of federal funds and protected health care providers;
- 2) It will leave unclear how and even whether the Obama Administration intends to enforce these important civil rights laws; and
- 3) It will leave unclear to what federal office complaints of discrimination should be directed and whether or not the federal government will investigate such complaints.

Instead of rescinding the “Provider Conscience Regulation,” the Obama Administration indicated that it might modify it. That could have the effect of narrowing the Administration’s interpretation of the statutory protections against discrimination, make it more difficult to report complaints of discrimination and have them investigated, and create administrative barriers to enforcing the laws.

As with other civil rights laws, if an administration signals that it does not consider them important – by ignoring or administratively weakening its interpretation and enforcement of them – it will also weaken compliance with such laws and invite new instances of discrimination. For example, in the wake of weakened federal enforcement of the conscience rights laws some states would likely attempt to condition licensure on a providers’ agreement to perform and/or refer for procedures to which the providers morally object.

Does the regulation limit patient access to reproductive health care services, including contraceptive services? _____

As a practical matter, improved access to reproductive services cannot be achieved by employing state power to coerce health care providers to engage in conduct contrary to their moral or religious beliefs regarding the sanctity of human life. Doing so will produce the opposite result: The range of available health care services will be diminished, not enlarged, as health care providers committed to their moral and religious beliefs stop providing services altogether, or decline to enter the health professions in the first place; an outcome that would be especially detrimental to health care services in rural and low-income communities. This reality is simply incomprehensible to the opponents of provider conscience rights and the laws and regulations that protect them.

Several of the conscience statutes on which the regulation is based have been in effect for more than thirty years. During that time no objective evidence has emerged to suggest that providers' reliance on these laws not to provide services to which they morally object has decreased the availability of abortion, sterilization or contraceptives. These procedures and services have been and remain readily available in most areas of the United States. Opponents of the conscience laws and regulation allege otherwise, but their claims are anecdotal or hypothetical, and have never been substantiated.

Does the regulation permit health care providers to discriminate against patients, such as illegal immigrants, patients with disabilities, HIV patients, or on the basis of race or sexual preference?

No. To reiterate, several of the statutes on which the regulation is based have been in existence for more than three decades, and there is no evidence that they have led providers to use them as a pretext to discriminate against certain classes of patients. Furthermore, the regulation does not expand the scope of the statutes on which it is based in a way that would permit such discrimination.

The health care conscience protection laws exist as one part of a network of federal civil rights laws that address discrimination on a variety of grounds. Actions that violate these federal laws, continue to violate them. There is no conflict between the operation of the health care conscience protection laws and other federal laws. They are, in fact, complementary.

Entities subject to these laws are responsible for ensuring against illegal discrimination in providing health care to the public, while also protecting the conscience rights of the health care workers who are affiliated with these entities.

Can the regulation's objectives be met by non-regulatory means such as outreach and education?

As the repeated instances of actual and attempted discrimination cataloged above demonstrate, there is a need for both regulatory enforcement and outreach and education. By itself, education would likely be insufficient to deter certain policymakers and their private-sector allies from their oft stated mission to discriminate against health care providers on the basis of their moral or religious convictions against providing and referring for abortion. Furthermore, no thoughtful observer would seriously suggest that the government rely solely on education and outreach to deter discrimination covered by other important federal civil rights laws.

Does the regulation place excessive administrative burdens on providers?

No. Providers who are recipients of federal funds must already certify or assure their compliance with certain federal non-discrimination laws as part of existing funding applications. Adding one more requirement to the non-discrimination representations will not measurably increase administrative burdens on providers. Those who claim that the regulation imposes excessive administrative burdens need to explain why conscience rights should be treated differently than other compliance representations, such as those related to non-discrimination on the basis of race or disability.

The federal provider conscience protection laws are not new. They are existing requirements on certain federal funds that recipients should be following already.

What can I do to help?

- 1) Email President Barack Obama today at www.whitehouse.gov/contact/ and urge him to retain the HHS “Provider Conscience Regulation” in its current form. Tell the president that you want him to be helpful, not neutral or hostile, in the protection of provider conscience rights. Americans might disagree profoundly about the legal status of abortion, but for more than three decades there has been a societal consensus that no individual or institutional provider should be compelled to participate in or refer for one. Rescinding or weakening the “Provider Conscience Regulation” would be the first step in shattering this consensus and could lead to the stigmatization and marginalization of health care providers that conscientiously object to the procedure.
- 2) Email this document to others in your organization. There is an urgent need to deepen the health care ministry’s understanding of the threats to the laws and regulations that enable it to operate its hospitals in accordance with its religious and moral convictions.
- 3) Learn more about this issue at the website www.thealliance.net.

Conclusion

In promulgating the “Provider Conscience Regulation” the U.S. Department of Health and Human Services was not granting a “privilege” to providers that have moral objections to abortion. It was fulfilling the government’s duty to create an administrative framework for enforcing important civil rights laws that protect provider conscience rights. It was also fulfilling its duty to protect an even more fundamental right – the free exercise of religion – the first freedom embodied in the Bill of Rights to the United States Constitution.

But these rights and freedoms have formidable opponents. The decade-long campaign by professional accrediting agencies, state legislators, state regulators, state attorneys general, and “pro-choice” organizations to ignore, undermine or attack provider conscience rights and laws, along with the U.S. President’s announced intention to rescind the “Provider Conscience Regulation,” are but a prelude to an even more sophisticated, systematic attack on these rights and laws in Congress, state legislatures, the courts, and the media.

If the term “pro-choice” means anything at all it must apply equally both to those who support abortion and those who conscientiously object to it. The federal provider conscience protection laws and regulations are comparable to state and national polices that protect conscientious objectors to war from being forced to engage in combat, and physicians who conscientiously object to capital punishment from being compelled to assist state sanctioned executions. The provider conscience rights laws and regulations advance an enlightened national policy that furthers tolerance, religious freedom and pluralism.



*Representing California's Catholic
Health Systems and Hospitals*

Alliance of Catholic Health Care
1215 K Street, Suite 2000 • Sacramento, CA 95814
916.552.2630