

GROWING CHALLENGES TO HEALTH CARE PROVIDER CONSCIENCE RIGHTS

Why The Federal Hyde-Weldon Amendment Must Be Strengthened This Year

A growing number of governmental agencies are discriminating against hospitals, physicians and insurers that are opposed to abortion by forcing them to perform, be complicit in, or pay for abortions.

This type of governmental discrimination is currently addressed by a federal statute – the Weldon Amendment – that specifically prohibits government discrimination against health care providers and insurers who choose not to perform or refer for abortions. Unfortunately, some state agencies are evading Weldon's requirements by alleging the statute does not apply to government agencies that don't directly receive federal funding. They also contend that, even if Weldon should apply, the penalty for violating it – the loss of all federal health, education and labor funds – is too draconian to realistically be enforced. Finally, victims of governmental discrimination must rely solely on the U.S. Department of Health and Human Services' (HHS's) Office for Civil Rights to investigate complaints of discrimination – an incomplete and inadequate response, especially if HHS may itself be the offending agency (see below).

The recently amended version of the Abortion Non-Discrimination Act (ANDA) (H.R. 361/S. 165) would remedy these deficiencies by: empowering the federal courts to provide victims of discrimination injunctive and other forms of relief; adding a "private right of action" that will enable victims to seek redress directly through the federal courts; allowing enforcement by means other than refusal of all federal funds to a governmental entity; clarifying that ANDA covers all agencies of state and local governments, whether or not they directly receive federal funding; and allowing victims to pursue relief in the courts, without first exhausting federal administrative remedies.

Examples of Existing Threats to Provider Conscience Rights

- **California.** The California Department of Managed Health Care (DMHC) recently claimed that the Weldon statute does not apply to its actions, as the DMHC does not directly receive federal funding. It then attempted to coerce Catholic health care employers to cover abortions in their employees' health insurance plans. No California law or regulation required the DMHC to take this position. The DMHC's conduct raises the real concern that other California state agencies, such as those responsible for hospital and insurer licensure, will also begin to ignore Weldon's non-discrimination requirements. For example, under California law the DMHC is required to license risk-bearing Accountable Care Organizations (ACOs) and similar provider arrangements. Having already dismissed Weldon, the DMHC will likely require ACOs to cover so-called "medically necessary abortions" as a "standard of care" and condition for licensure. The new California insurance exchange will certify Qualified Health Plans (QHPs) and stipulate the benefits it requires them to cover. The exchange will likely follow the DMHC's lead in respect to requiring QHPs to cover "medically necessary abortions." Millions of individuals will be buying coverage through the exchange by 2016. These actual and potential actions by California state agencies will shape a statewide health care market that will be hostile to hospitals, physician groups, insurers and others who choose not to perform or cover abortions. Of considerable concern is that health care agencies in other states could easily adopt the DMHC's overly narrow administrative interpretation of Weldon.
- **Kentucky.** The Kentucky State Attorney General is targeting a proposed merger that would combine University of Louisville Hospital with two subsidiaries of Catholic Health Initiatives (CHI). The Kentucky AG is concerned, in part, that the merged entity would not provide abortions. As a result, he may contest

the proposed merger. He's considering doing this despite the existence of Weldon and the fact that CHI is pledging to supply \$320 million in working capital to the merged entity, \$200 million in facilities improvements and \$100 million in other services statewide.

- **Maryland.** State and local governments are under intense pressure from a host of advocacy groups, such as the National Organization for Women (NOW) and Merger Watch, to prevent the expansion of hospitals that don't provide abortions. In Maryland, these groups are bitterly contesting Holy Cross Hospital's (Silver Spring) proposal to build and operate an additional hospital in Germantown, MD, as the new facility would not perform abortions. In January 2011, the Maryland Health Care Commission approved Holy Cross' proposal. It judged Holy Cross to be the hospital best positioned financially to improve access to hospital services for residents of upper Montgomery County and provide adequate bed capacity for the future; and noted that women could readily find reproductive health services elsewhere in the county. Despite the Commission's approval, advocacy groups hostile to conscience rights are continuing to pressure county and local governments to deny Holy Cross Hospital's proposed expansion.
- **Federal Government.** Secretary Sebelius recently issued a cooperative agreement funding opportunity announcement (FOA) for the National Human Trafficking Victim Assistance Program that appears to be in direct conflict with the Weldon Amendment. Specifically, the solicitation states "preference will be given to grantees under this FOA that will offer all victims referral to medical providers who can provide or refer for...the full range of legally permissible gynecological and obstetrics care." The term "full range of legally permissible gynecological and obstetrics care" is frequently used as a euphemism for the provision of abortions. Giving preferential treatment to applicants that provide and refer for abortion would be a flagrant violation of the Weldon statute, and in direct contradiction to the Obama administration's claims to support "clear and strong" conscience protections. The administration stated in comments accompanying its revision of the Bush-era conscience regulation that HHS would work to incorporate new language into all new contracts with grantees to ensure respect for conscience rights; now it is doing exactly the opposite.

Conclusion

If Congress fails to strengthen Hyde-Weldon by enacting ANDA this year, and state agencies, such as those in California, adopt requirements for hospitals, physician groups and insurers to provide or cover abortions, many providers would no longer be able to comply with their deepest moral and religious convictions. As a result, some hospitals would be forced to close and redirect their resources to other charitable activities; others would be compelled to sell to or merge with owners that provide abortions; and many physicians opposed to abortion would become economically isolated in an increasingly competitive marketplace. Failing to strengthen federal conscience protections would not increase the availability of abortion,¹ but would eliminate access to high quality and efficient providers that have been serving Americans of all beliefs exceedingly well for decades and, in the case of some hospitals, for more than a hundred years.

Enacting ANDA this year is made all the more urgent by the implementation of the Patient Protection and Affordable Care Act (PPACA). PPACA will drive hospitals, doctors and insurers to form new networks and cooperative arrangements, increasing pressure on those who choose not to provide abortions. Unless federal legal protection for their rights is both clear and enforceable, governments at every level may compel them to choose between compromising their deepest convictions in respect to nascent human life or going out of existence, or leaving their chosen professions.

¹ For example, state and federal civil rights laws that protect health care providers from being forced to provide or pay for abortions have not prevented abortion from being widely available in California. According to the Guttmacher Institute, abortion is readily available in California. California has the largest number of abortions annually and the fifth highest rate of abortions among the states. Guttmacher reports that only 4 percent of California women aged 15 to 44 live in counties with no abortion provider (clinic, hospital or otherwise), the lowest percentage of any state in the nation. It is important to understand that very few abortions are performed in hospitals, regardless of their affiliation. Only 5 percent of all abortions were provided in hospitals nationally in 2005 and only about 15 percent of all hospitals were involved.