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New "Conscience" Rules for Health Care Providers

May 21 2019

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Practice Area: Health Law

Final rules to enforce the "Conscience Laws" were published on May 21, 2019, by the U.S. Department of Health & Human Services ("HHS"). The so-called Conscience Laws are a series of previously enacted laws that allow health care workers to opt out of participating in certain health care activities that violate the worker's conscience or religious beliefs such as abortion, sterilization, and assisted suicide.[1] The rules implement new enforcement mechanisms and provide greater specificity concerning what health care organizations need to do to ensure its workforce receives the protections afforded by the Conscience Laws.

San Francisco's city attorney has filed suit in federal court challenging the constitutionality of the rule. Nevertheless, the rule is set to become effective 60 days after publication, or July 22, 2019.

This *Legal Update* provides an overview of which providers are subject to the new rules and what the rule requires.

Who: The new rules apply to those entities that are covered by the existing Conscience Laws and include most health care entities that receive federal financial assistance. However, the new rules designate which requirements a provider must follow by categorizing providers between "direct recipients" of federal funds (such as Medicare Part A providers) from "sub-recipients" (such as a state Medicaid or Medicare Part C/Medicare Advantage providers).

What and How: Generally, the rules require entities that receive federal financial assistance to (1) maintain records, (2) provide certifications and assurances, and (3) cooperate with the Office of Civil Rights ("OCR") in relation to enforcement of the underlying Conscience Laws. Specifically, the new rules require the following:

Maintenance of Records

- Record keeping requirements apply to both direct "recipients" and "sub-recipients" of federal financial assistance.
- Providers must maintain records of both protections afforded to employees and any allegations of discrimination on the basis of religious belief or moral conviction. These records include: complaints; statements, policies, or procedures for accommodating employees or other protected individuals; records of requests for religious or moral accommodation and the entity's response for such requests; and evidence of compliance with existing Conscience Laws.
- The records may be in any form that affords OCR with reasonable access.
- All records shall be maintained for three years from the date the record was created.

Assurances and Certification

- The requirement to provide assurances and certification applies only to "recipients" and does *not* apply to "sub-recipients" of federal assistance.
- Written assurances and certification of compliance with existing Conscience Laws must be submitted during the application and reapplication processes associated with receiving federal financial assistance.
- Entities that are already receiving federal assistance as of the effective date of the rule are not required to submit an assurance or certification. However, the entity is required to submit written assurances and certification upon reapplying for existing assistance, altering the terms of existing assistance, or applying for new lines of Federal assistance.
- Entities that first apply to receive federal assistance after the effective date of the rule must submit written assurances and certification upon submission of such application.
- Entities that participate in multiple federal assistance programs do not need to file more than one written statement of assurances and certification with OCR.
- OCR may demand additional submissions of assurances and certifications if OCR or HHS has reason to suspect the possibility of noncompliance with the Conscience Laws.
- OCR is currently working toward including the assurances and certification language on standard application forms.
- The rules grant recipients of certain specified federal assistance programs an exception from the assurances and certification requirements (including certain Medicare Part B providers, Administration for Children and Families grantees, Administration on Community Living grantees, and Tribal Organizations).

Cooperation with OCR and Reporting

- The reporting provisions apply to both "recipients" and "sub-recipients" of federal financial assistance.
- Providers are required to cooperate with OCR during any compliance review, investigation, interview, or other enforcement process.
- Providers are further required to disclose any OCR determination of noncompliance on any application for federal financial assistance for three years following such determination.

When: Unless a challenge to these rules is successful, the new rules will become effective 60 days after publication in the Federal Register, or on July 22, 2019.

On a final note: the *proposed* rule included a requirement that covered entities post notices to inform its workforce of their rights under federal conscience and anti-discrimination laws. This proposed requirement was not included in the final rule, however. Instead, the OCR will consider the posting of notices as "non-dipositive evidence of compliance if the OCR were to investigate the recipient's compliance with the Federal conscience and anti-discrimination laws."

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[1]The protections of underlying laws that the rule seeks to enforce are: the Church Amendments; the Coats-Snowe Amendment; the Weldon Amendment; Affordable Care Act conscience protections regarding abortion coverage, assisted suicide, and provisions prohibiting the discriminatory denial of a religious exemption from the individual mandate; Section 1553 of the Affordable Care Act concerning the right to not participate in assisted suicide; certain conscience protections under Medicare Advantage and Medicaid; conscience protections concerning advance directives with respect to certain HHS-funded programs; conscience protections for Global Health Programs administered by HHS or funded by HHS appropriations; conscience exemptions for patients from certain specified health care services; and conscience protections for religious nonmedical health care institutions and patients who seek religious nonmedical care.

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