

## INSIDE NEW HHS PLAN FOR HEALTH CARE WORKER PROTECTIONS

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In a move designed to protect health care workers from being forced into participating in activities that violate their consciences or religious beliefs, the [U.S. Department of Health and Human Services](#) recently announced the creation of a new Conscience and Religious Freedom Division. As part of the HHS's Office for Civil Rights, the new division intends to "restore federal enforcement of our nation's laws that protect the fundamental and unalienable rights of conscience and religious freedom."

The new division is charged with enforcing existing federal laws that protect health care workers who object to performing or assisting with services, such as abortions, sterilizations or assisted suicides, on the basis of their religious or moral beliefs. In addition, HHS proposed a new regulation to help achieve enhanced protections for employees at entities that receive funds through programs funded or administered through HHS.

### Existing Conscience and Religious Freedom Protections

HHS enforces existing federal laws that protect the free exercise of religion and conscience and prohibit discrimination and coercion in health and human services for HHS-funded or conducted programs. According to HHS, 25 statutory conscience provisions currently are on the books to protect U.S. health care workers. These existing federal laws prohibit religious discrimination in employment for recipients of HHS federal financial assistance, including provisions in the Social Security Act, the Public Health Service Act, the Family Violence Prevention and Service Act, the Maternal and Child Health Services Block Grant, Projects for Assistance in Transition from Homelessness, Community Mental Health Services Block Grant, and Substance Abuse Prevention and Treatment Block Grants.

Additional conscience protections include the following:

- Conscience protections related to abortion, sterilization and certain other health services to participants in programs, and their personnel, funded by HHS (the Church amendments);
- Conscience protections for health care entities related to abortion provision or training, referral for such abortion or training, or accreditation standards related to abortion (the Coats-Snowe amendments);
- Protections from discrimination for health care entities and individuals who object to furthering or participating in abortion under programs funded by the department's yearly appropriations (the Weldon amendment);
- Conscience protections under the Patient Protection and Affordable Care Act related to assisted suicide, the ACA individual mandate and other matters of conscience (ACA);

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- Conscience protections related to advanced directives; and
- Protections for objections to counseling and referral for certain services in Medicaid or Medicare Advantage.

### **New Division To Focus on Enforcement**

In HHS's Jan. 18, 2018, announcement, OCR Director Roger Severino stated, "Laws protecting religious freedom and conscience rights are just empty words on paper if they aren't enforced." He further commented, "America's doctors and nurses are dedicated to saving lives and should not be bullied out of the practice of medicine simply because they object to performing abortions against their conscience."

As a result, the New Conscience and Religious Freedom Division will have the authority to initiate compliance reviews, conduct investigations, supervise and coordinate compliance by the department and its components, and use enforcement tools otherwise available in civil rights law to address violations and resolve complaints. As part of that authority, the division may require that certain recipients of federal money keep more robust records, provide assurances and certifications of compliance, issue notices to their employees regarding their conscience and anti-discrimination rights, and cooperate with investigations, reviews and other enforcement actions.

### **Proposed New Conscience Regulation**

In addition to creating a new enforcement division, HHS proposed a new conscience regulation that the agency says is modeled after existing regulations for other civil rights laws. Filed on Jan. 19 with formal publication on Jan. 26, 2018, the proposed rule would apply to entities that receive funds through programs funded or administered in whole or in part through HHS.

In text accompanying the proposed rule, HHS states that OCR has received a total of 44 complaints under the federal health care conscience laws since 2008, the year in which OCR was designated as the authority to enforce such laws. It further states that 34 of those complaints were filed since the November 2016 election. Concerns over the handling of those complaints, in part, drove the promulgation of the new proposed rule which would amend an existing 2011 rule to clarify what is and is not required under the existing federal health care conscience and related anti-discrimination laws as well as provide OCR with the proper enforcement tools.

Under the proposed rule, enforcement would be based on complaints, referrals, news reports and OCR-initiated compliance reviews and communications activities. If OCR becomes aware of a potential violation of federal health care conscience and religious freedom laws, it will require the entity to come into compliance. Enforcement mechanisms would include termination of relevant funding, in whole or in part, claw backs, referral to the [U.S. Department of Justice](#), and other measures. The rule also would grant OCR the authority to resolve claims of intimidation and retaliation against those who file a complaint or assist in an OCR investigation.

The proposed rule is open for public comment for 60 days, with comments closing on March 27, 2018.

### **New Guidance for Medicare and Medicaid Services**

On Jan. 19, 2018, the HHS's [Centers for Medicare & Medicaid Services](#) sent a new guidance letter to state Medicaid directors. The letter rescinds an April 2016 guidance which limited state authority to regulate providers operating within their state. In particular, the 2016 guidance was seen as specifically restricting states' ability to take certain actions against family-planning providers that offer abortion services. The new guidance is intended to restore state flexibility to establish what CMS calls "reasonable standards" to state Medicaid programs.

### **What This Means For Health Care Providers and Their Employers**

The increased enforcement of religious and moral protections anticipated by the new HHS division and proposed rule may empower more health care workers to express objections to performing or being involved with certain procedures or services. Health care employers should have a plan in place for how to respond to such objections. That plan should include providing reasonable accommodations to objecting workers, which involves documenting the objection, analyzing how to transfer duties to another worker, determining whether objectors need to be reassigned, and establishing how communications to co-workers will be handled. These can be sensitive discussions so health care facilities need to consider how to address these issues in advance. In particular, employers must learn how to accommodate the workers' objection without adversely affecting their position, as the adverse action could potentially be seen as discriminatory based on the worker's religious beliefs.

Finally, it will be important that health care employers keep proper records regarding their compliance efforts and stay abreast of what notices they are required to provide their workers and the government. Employers should keep a watchful eye to ensure they know precisely what will be required of them in the months ahead, especially as the proposed regulation heads to becoming a final rule.

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