

Understanding the Impact of Federal Conscience Rights on Health Care Employers: Navigating Legal Protections and the 2023 Final Rule

Article

Amundsen Davis Health Care Alert

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Conscientious objection in health care is the refusal of a health care professional to provide or participate in the delivery of a legal, medically appropriate health care service to a patient because of personal beliefs. Federal conscience rights are contained in various federal statutes and regulations -- the Church Amendments, Section 45 of the Public Health Act, the Weldon Amendment, the Affordable Care Act and Medicare and Medicaid regulations -- that collectively protect the right of health care providers to object to performing certain medical procedures if doing so would be contrary to the provider's religious beliefs or moral convictions. These provisions prohibit employers and governmental agencies and programs from discriminating against health care providers and entities as a result of those objections. The medical services covered by the federal conscience rules are abortion care and sterilization procedures, assisted suicide and training regarding such procedures.

A health care provider may not be

- required to participate in, or be discriminated against for refusing to participate in, specific medical procedures and related training and research activities; or
- coerced into performing procedures that are against their religious or moral beliefs; or
- discriminated against for refusing to provide health care items or services related to assisted suicide or euthanasia.

The HHS conscience regulations had included the same protections and enforcement framework within the HHS Office of Civil Rights (OCR) since 2011. However, in 2019 the Trump administration approved a major expansion of the conscience provisions to include *any* procedure to which a health care provider objected, including abortions, contraception, gender-affirming care, and HIV and STD services. The 2019 Rule also created new compliance regulations and

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enforcement mechanisms. Later that year, federal courts in New York, California and Washington vacated the 2019 Rule, which meant the 2011 Rule continued in effect.

In 2023, the Biden administration proposed a new rule to make clear that the 2011 Rule continued in effect and to implement portions of the 2019 Rule that were not held unlawful. After the required public comment period, the Final Rule was published and goes into effect on March 11.

The Final Rule:

- Grants OCR the authority to receive, handle and investigate complaints regarding the Federal health care conscience rights;
- Restores OCR's enforcement process for the Federal health care conscience rights, including conducting investigations, supervising compliance, withholding relevant funding, and making enforcement referrals to the Department of Justice;
- Strengthens protections against conscience discrimination by permitting anyone to file a complaint with OCR and allowing OCR to negatively consider an entity's failure to respond to a request for information within a reasonable time;
- Encourages covered entities to post notices by providing that OCR will consider an entity's posting of the notice as a factor in any investigation under the rule. The rule provides model text for the notice in an Appendix, which we have posted here for the reader's convenience.

While the Final Rule does not require a significant change in operations for health care employers, it is a good reminder that the federal conscience rules only permit providers to object to providing *certain* services for religious or moral reasons. For example, they do not permit providers to refuse to provide services to transgender patients. In addition, health care employers should post the notice encouraged by the Final Rule to be viewed more favorably by OCR in the event there is an investigation.

Health care employers are encouraged to contact counsel with questions regarding the impact of the Final Rule on their workforce.

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