

A New Health and Human Services "Conscience Rule"

Much welcome news for health care entities and health care providers...

Many health care entities are scrambling to understand and to address the requirements of the new Health and Human Services ("HHS") Conscience Rule, slated to take effect on July 22, 2019. Given pending legal challenges to the new Conscience Rule, HHS has agreed to postpone its effective date until November 22, 2019. Will you be ready?

What is the Rule?

The Rule is intended to protect "individuals, entities, and *healthcare entities*" (emphasis supplied) that "refuse to perform, assist in the performance of, or undergo certain health care services or research activities to which they may object for religious, moral, ethical, or other reasons." The Rule implements approximately 25 existing federal conscience protection provisions ("Conscience Provisions"), including various provisions of the Affordable Care Act. Some of the implemented Conscience Provisions, like the Church Amendment, provide very broad protections for individuals and organizations who object to health care procedures on a religious or moral basis. Other Conscience Provisions are specific, addressing issues such as advanced directives or HIV/AIDS treatment.

What is a health care entity under the Rule?

The Rule applies to virtually any entity that receives HHS Funding. The type of funding an entity receives determines which of the 25 Conscience Provisions apply. Take, for instance, a subsection of the Church Amendment. Under this subsection, entities—which include, but are not limited to, individuals, corporations, states, public agencies, public institutions, and intergovernmental organizations—that receive funding for "any health service program or research activity under any program administered by the Secretary of HHS cannot require any individual to perform or assist in the performance of any part of a health service program or research activity . . . if the individual's performance or assistance in the performance . . . would be contrary to his religious beliefs or moral convictions."

What is the breadth of the Rule's application?

The Rule is to be construed "in favor of a broad protection of the free exercise of

POSTED:

Jul 2, 2019

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religious beliefs and moral convictions, to the maximum extent permitted by the Constitution and the terms of the Federal conscience and anti-discrimination laws." The definition of "health service program" under the Church Amendment subsection illustrates how broad the Rule's application is, providing that a "health service program includes the provision or administration of any health or health-related services or research activities, health benefits, health or health-related insurance coverage, health studies, or any other service related to health or wellness, whether directly; through payments, grants, contracts, or other instruments; through insurance; or otherwise." In other words, virtually anything that happens in a hospital likely counts.

What must health care entities do to comply?

The Rule includes three categories of compliance requirements: (1) records and information; (2) cooperation; and (3) reporting. The compliance requirements apply to any individual or organization (public or private) that receives HHS funding or assistance ("recipient") or any individual or organization (public or private) for which there is a "pass-through" of HHS funding or financial assistance ("sub-recipient").

In addition to meeting those specific compliance requirements, the Rule suggests recipients voluntarily post "a notice of nondiscrimination" in text "large and conspicuous enough to be read easily" and presented "in a format, location, or manner that impedes or prevents the notice being altered, defaced, removed, or covered by other material."

The notice may be posted with other nondiscrimination notices.

What assurance and certification of compliance requirements apply?

Moving forward, applications for HHS funding or financial assistance must be accompanied by: (1) the applicant's or recipient's assurance of current compliance with the Conscience Provisions; and (2) a certification that the applicant or recipient will continue to comply with the Conscience Provisions.

Individuals or entities that have already received HHS funding as of the Rule's effective date are required to submit the assurance and certification "as a condition of any application or reapplication for funds" or "through any instrument or as a condition of an amendment or modification of the instrument that extends the terms of such instrument or adds additional funds to it." HHS may require "more frequent" submissions if the applicant or recipient does not satisfy the assurance and certification requirements or the HHS "has reason to suspect or cause to investigate the possibility of such failure."

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Certain entities are exempt from the assurance and certification requirements, including: (1) physicians, physicians' offices, pharmacists, pharmacies, and other health care practitioners participating in Medicare Part B; (2) entities receiving certain non-health-related grants administered by the Administration for Children and Families; (3) entities receiving certain non-health-related grants administered by the Administration on Community Living; and (4) in some circumstances, Indian Tribes and Tribal Organizations.

Who will enforce compliance?

HHS's Office of Civil Rights has been granted broad enforcement authority under the Rule, including the authority to:

- receive and handle complaints;
- initiate compliance reviews;
- conduct investigations;
- coordinate compliance with HHS;
- seek voluntary resolution of complaints;
- make enforcement referrals to the Department of Justice;
- institute remedial measures, such as temporarily or permanently withholding HHS funding.

How will employers know if an employee has a religious or moral objection protected by the Rule?

An employer may lawfully require an *employee*—not an applicant—to disclose any potential religious or moral objections. The employer can subsequently require employees to disclose this information only once per the calendar year "unless supported by a persuasive justification" to require disclosure more frequently.

If you have any questions or need assistance in complying with the Rule, please contact [Lynn M. Stathas](#) or your Reinhart attorney.

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