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The History and Effect of Abortion Conscience Clause Laws

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Summary

Conscience clause laws allow medical providers to refuse to provide services to which they have religious or moral objections. In some cases, these laws are designed to excuse such providers from performing abortions. While substantive conscience clause legislation, such as the Abortion Non-Discrimination Act, has not been approved, appropriations bills that include conscience clause provisions have been passed. This report describes the history of conscience clauses as they relate to abortion law and provides a legal analysis of the effects of such laws. The report also discusses the issuance of a new rule to implement some of the existing conscience clause laws, and recent efforts to rescind that rule. Finally, the report reviews the conscience protection provisions of the House- and Senate-passed health reform measures, H.R. 3962 and H.R. 3590.

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Conscience clause laws allow medical providers to refuse to provide services to which they have religious or moral objections. These laws are generally designed to reconcile "the conflict between religious health care providers who provide care in accordance with their religious beliefs and the patients who want access to medical care that these religious providers find objectionable."[1] Although conscience clause laws have grown to encompass protections for entities that object to a wide array of medical services and procedures, such as providing contraceptives or terminating life-support, the original focus of conscience clause laws was on permitting health care providers to refuse to participate in abortion or sterilization procedures on religious or moral grounds.

Historical Background

In 1973, Congress passed the first conscience clause law, commonly referred to as the Church Amendment,[2] in response to the U.S. Supreme Court's decision in *Roe v. Wade* and a U.S. district court decision that enjoined a Catholic hospital from prohibiting a physician from performing a sterilization procedure at the facility.[3] During consideration of the Church Amendment, Senator Frank Church explained the need for the conscience clause, stating, "It clears up any ambiguity in the present law by making it explicitly clear that it is not the intention of Congress to mandate religious hospitals to perform operations that are contrary to deeply held religious beliefs."[4]

The Church Amendment provides that individuals or entities that receive grants, contracts, loans, or loan guarantees under the Public Health Service Act (PHSA), the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act may not be required to perform abortions or sterilization procedures or make facilities or personnel available for the performance of such procedures if such performance "would be contrary to [the individual or entity's] religious beliefs or moral convictions."[5] The Church Amendment also prohibits entities that receive federal funds under the specified statutes or under a biomedical or behavioral research program administered by the Department of Health and Human Services (HHS) from engaging in employment discrimination against doctors or other medical personnel who either perform abortions or sterilization procedures or who refuse to perform such services on moral or religious grounds.[6]

By 1978, five years after the Court's decision in *Roe*, virtually all of the states had enacted conscience clause legislation in one form or another.[7] From 1978 to 1996, there was a lull in conscience clause activity, with one exception. When Congress enacted the Civil Rights Restoration Act in 1988, it adopted the Danforth Amendment, which mandates neutrality with respect to abortion.[8] Specifically, the amendment clarifies that Title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally funded education

[1] Katherine A. White, Crisis of Conscience: Reconciling Religious Health Care Providers' Beliefs and Patients' Rights, 51 Stan. L. Rev. 1703, 1703 (1999).

[2] P.L. 93-45, § 401(b), (c), 87 Stat. 91 (1973). Additional conscience provisions supplemented the Church Amendment in 1974 and 1979. *See* P.L. 93-348, § 214(b), 88 Stat. 353 (1974); P.L. 96-76, § 208, 93 Stat. 583 (1979).

[3] *See* 119 Cong. Rec. 9,595 (1973) (statement of Sen. Church).

[4] *Id*. at 9,600.

[5] 42 U.S.C. § 300a-7(b).

[6] 42 U.S.C. § 300a-7(c).

[7] Rachel Benson Gold, Guttmacher Institute, Conscience Makes a Comeback in the Age of Managed Care (Feb. 1998), http://www.guttmacher.org/pubs/tgr/01/1/gr010101.html.

[8] P.L. 100-259, § 3(b), 102 Stat. 28, 29 (1988).

programs, may not be construed to prohibit or require any individual or entity to provide or pay for abortion-related services, nor may it be construed to permit the imposition of a penalty on any person who has sought or received abortion-related services.[9]

Nearly a decade after the Danforth Amendment, Congress passed additional conscience provisions in the Omnibus Consolidated Rescissions and Appropriations Act of 1996.[10] Under the act, which added Section 245 to the PHSA, the federal government and state and local governments are prohibited from discriminating against health care entities that refuse to undergo abortion training, provide such training, perform abortions, or provide referrals for the relevant training or for abortions.[11] Section 245 protects doctors, medical students, and health training programs from being denied federal financial assistance or a license or certification that they would otherwise receive but for their refusal to provide abortion services or training.[12]

One year after passing the 1996 omnibus legislation, Congress again revisited the abortion conscience clause issue when it approved the Balanced Budget Act of 1997.[13] Concerned that managed care plans might seek to prevent doctors from informing patients about medical services not covered by their health plans, Congress amended the federal Medicare and Medicaid programs to prohibit managed care plans from restricting the ability of health care professionals to discuss the full range of treatment options with their patients.[14] The legislation, however, simultaneously exempted managed care providers under these programs from the requirement to provide, reimburse for, or provide coverage of a counseling or referral service if the managed care plan objects to the service on moral or religious grounds. Thus, a Medicare and Medicaid managed care plan cannot prevent providers from providing abortion counseling or referral services, but it can refuse to pay providers for providing such information, although the plan must notify new and existing enrollees of such a policy if it does indeed have one.[15]

The effect of the 1997 legislation was to extend the coverage of conscience clause laws beyond the individuals who provide medical care to the companies that pay for such care under the Medicare and Medicaid programs. The law allows Medicare and Medicaid-funded health plans to refuse to provide counseling and referral for abortion-related services. Earlier conscience clause laws permitted providers to opt out only of the actual provision of such services.[16]

The 1997 legislation would appear to have a broader impact than the 1973 Church Amendment, both in terms of its effect on the entities that may refuse to provide abortion services and on the individuals who wish to access such services. In a similar vein, recent abortion bills introduced in Congress have proposed changes that would expand the scope of current conscience clause laws. This legislation is discussed in the next section.

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[9] 20 U.S.C. § 1688.

[10] P.L. 104-134, 110 Stat. 1321 (1996).

[11] 42 U.S.C. § 238n(a)(1).

[12] 42 U.S.C. § 238n(b)(1).

[13] P.L. 105-33, 111 Stat. 251 (1997). The Medicare conscience clause provision is codified, as amended, at 42 U.S.C. § 1395w-22(j)(3)(B). The identical Medicaid conscience clause provision is codified, as amended, at 42 U.S.C. § 1396u-2(b)(3)(B).

[14] 42 U.S.C. § 1395w-22(j)(3)(A); 42 U.S.C. 1396u-2(b)(3)(A).

[15] 42 U.S.C. § 1395w-22(j)(3)(B); 42 U.S.C. 1396u-2(b)(3)(B).

[16] Despite the new exemptions regarding the provision of counseling and referral or abortion-related services, programs funded by Medicaid are nevertheless required to provide family planning services to their clients, either directly or through referral and payment to other providers. 42 U.S.C. § 1396d(a)(4)(C).

Recent Legislation and its Effect on Existing Law

The Abortion Non-Discrimination Act (ANDA) has been introduced in every Congress since the 107th Congress.[17] In general, ANDA would amend the nondiscrimination provision in the PHSA to expand the definition of the term "health care entity" to include hospitals, provider-sponsored organizations, health maintenance organizations (HMOs), health insurance plans, or any other kind of health care facility, organization, or plan.

Supporters of ANDA maintain that expanding the definition of "health care entity" is necessary because some state legislatures and courts have weakened existing conscience clause protections, which proponents view as critical to shielding religious hospitals and other medical providers that oppose abortion. Opponents contend, however, that ANDA would impose serious restrictions on a woman's access to abortion. Critics also argue that ANDA would allow providers to drop abortion coverage not only for moral or religious reasons, but also for financial reasons, such as the desire to save money by reducing coverage.[18]

Although ANDA has not been considered by recent Congresses, conscience clause provisions with similar language were inserted in the FY2005, FY2006, and FY2008 appropriations measures for the Departments of Labor, HHS, and Education.[19] These provisions are commonly referred to as the Weldon Amendment because they were added to the FY2005 appropriations measure following the adoption of an amendment offered by Representative Dave Weldon. The language used in the appropriations measures has remained the same since 2004. The provisions state:

> None of the funds made available in this act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.[20]

The Weldon Amendment defines the term "health care entity" to include "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan."[21]

The Weldon Amendment prevents the federal government and state and local governments from enacting policies that require health care entities to provide or pay for certain abortion-related services. In addition, the Weldon Amendment increases both the number and type of health care providers and professionals who could refuse to provide abortion training or services without reprisals. For example, prior law protected only individual doctors or medical training programs that did not provide abortions or abortion training, and appeared to apply primarily in the medical

[17] S. 96, 111th Cong. (2009); S. 350, 110th Cong. (2007); S. 1983, 109th Cong (2005); H.R. 3664, 108th Cong. (2003); S. 1397, 108th Cong. (2003); H.R. 4691, 107th Cong (2002); S. 2008, 107th Cong. (2002).

[18] Reuters, *House Votes Hospitals May Avoid Abortions*, N.Y. Times, September 25, 2002, at A26.

[19] P.L. 108-447, div. F, § 508(d), 118 Stat. 2809, 3163 (2004); P.L. 109-149, § 508(d), 119 Stat. 2833, 2879 (2005); P.L. 110-5, § 2, 121 Stat. 8, 9 (2007) P.L. 110-161, div. G, § 508(d), 121 Stat. 1844, 2209 (2007); P.L. 110-329, div. A, § 101, 122 Stat. 3574, 3575 (2008). Appropriations for FY2007 and FY2009 were provided pursuant to continuing appropriations measures, and were subject to the same conditions that applied to FY2006 and FY2008 funds, respectively.

[20] P.L. 108-447, div. F, § 508(d)(1), 118 Stat. 2809, 3163 (2004); P.L. 109-149, § 508(d)(1), 119 Stat. 2833, 2879-80 (2005); P.L. 110-161, div. G, § 508(d)(1), 121 Stat. 1844, 2209 (2007).

[21] P.L. 108-447, div. F, § 508(d)(2), 118 Stat. 2809, 3163 (2004); P.L. 109-149, § 508(d)(2), 119 Stat. 2833, 2880 (2005); P.L. 110-161, div. G, § 508(d)(2), 121 Stat. 1844, 2209 (2007).

education setting or to doctors in their individual practices. In contrast, the appropriations provisions allow large health insurance companies and HMOs to refuse to provide coverage or pay for abortions. Because an HMO's refusal to provide abortion-related services would affect a much larger number of patients than an individual doctor's refusal to provide such services, the Weldon Amendment has the potential of denying abortion-related services to a significantly expanded number of individuals.

Although the Weldon Amendment language is similar to the proposed ANDA, it differs in two important respects. First, ANDA would deny all federal funds to entities that engage in abortion-related discrimination. The Weldon Amendment, however, denies only those funds available under the annual Labor, HHS, and Education appropriations measure. Second, the passage of ANDA would result in permanent legislation, while the Weldon Amendment language remains in effect for only the relevant fiscal years. Thus, although the Weldon Amendment expands prior law, it provides for smaller penalties and is temporary in nature.

Conscience Rule

On December 19, 2008, HHS issued a new rule to implement the Church Amendment, Section 245 of the PHSA, and the Weldon Amendment.[22] The new rule provides definitions for some of the terms used in the conscience protection laws, establishes a written certification of compliance requirement for recipients of federal health care funds, and identifies HHS's Office of Civil Rights as the entity responsible for complaint handling and investigation.

At the time the rule was issued, HHS maintained that it was necessary to educate the public and health care providers on the protections afforded by federal law.[23] The agency noted that the new rule would "[foster] a more inclusive, tolerant environment in the health care industry than may currently exist."[24] Opponents of the new rule, however, argued that the rule could jeopardize the health of individuals by making it more difficult to obtain health care services and information. They noted, for example, that the new rule could limit the availability of oral contraceptives.

On March 10, 2009, HHS published a proposed rule in the *Federal Register* to rescind the December 19, 2008, final rule.[25] HHS explained that the comments received during consideration of the rule "raised a number of questions that warrant further consideration."[26] The agency stated further,

> It is important that the Department have the opportunity to review this regulation to ensure its consistency with current Administration policy. Accordingly, we believe it would benefit the Department to review this rule, accept further comments, and reevaluate the necessity for regulations implementing the statutory requirements. Thus, the Department is proposing to rescind the December 19, 2008 final rule, and we are soliciting public

[22] Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78,072 (Dec. 19, 2008) (to be codified at 45 C.F.R. pt. 88).

[23] *Id*. at 78,074.

[24] *Id*.

[25] Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law; Proposal, 74 Fed. Reg. 10,207 (Mar. 10, 2009).

[26] *Id*. at 10,209.

> comment to aid our consideration of the many complex questions surrounding the issue and the need for regulation in this area.[27]

The comment period for the proposed rule ended on April 9, 2009. Since that date, HHS has not indicated whether the rule will be rescinded.

Conscience Protection and Health Reform

Legislation that attempts to reduce the number of uninsured individuals and restructure the private health insurance market has been passed by both the House of Representatives and the Senate. H.R. 3962, the Affordable Health Care for America Act, and H.R. 3590, the Patient Protection and Affordable Care Act, include provisions that address the coverage of abortion by health benefits plans that would be available through a health insurance exchange.[28]

In addition to addressing the coverage of abortions by plans in an exchange, the abortion provisions in both measures also provide conscience protection for specified entities. H.R. 3962, the House-passed bill, would prohibit a federal agency or program, or state or local government that receives federal financial assistance under the measure from subjecting any individual or institutional health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.[29] H.R. 3962 would also prohibit a federal agency or program, or state or local government that receives federal financial assistance under the bill from requiring any health plan created or regulated by the measure to subject any individual or institutional health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.[30] In contrast, H.R. 3590, the Senate-passed bill, would prohibit exchange plans from discriminating against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.[31] Neither measure would affect federal conscience protection and abortion-related antidiscrimination laws or Title VII of the Civil Rights Act of 1964.

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[27] *Id*. at 10,209-10,210.

[28] For additional discussion of health insurance exchanges, see CRS Report R40981, *A Comparative Analysis of Private Health Insurance Provisions of H.R. 3962 and Senate-Passed H.R. 3590*, coordinated by Chris L. Peterson (describing health insurance exchanges as facilitating the purchase of health insurance by providing individuals and small businesses with access to health benefits plans in a comparable way).

[29] H.R. 3962, 111th Cong. § 259(a) (2009).

[30] *Id*.

[31] H.R. 3590, 111th Cong. § 1303(b)(4) (as amended by § 10104(c)) (2009).

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