

## HHS FINAL CONSCIENCE RULE AND PROTECTED EMPLOYEES

**Update:** On November 6, 2019, a federal judge sitting in the Southern District of New York voided the U.S. Department of Health and Human Services Final Conscience Rule set to take effect November 22, 2019. For more information, click [here](#).

**Update:** This blog article was originally posted on May 20, 2019, and it stated that the New Conscience Rule had not yet been published in the Federal Register. The final rule was subsequently published in the Federal Register on May 21, 2019, and this article was updated on May 23, 2019, to reflect this development. Moreover, also on May 14, 2019 and May 21, 2019, a coalition of 23 states, cities and municipalities filed suits against HHS in the U.S. District Court of the Southern District of New York and the U.S. District Court of the Central District of California, alleging that the New Conscience Rule will undermine the states' ability to run their health care programs effectively. Hall Render will continue to follow any developments in the case.

On May 2, 2019, the U.S. Department of Health and Human Services ("HHS") Office of Civil Rights ("OCR") **announced** the issuance of the final conscience rule, which prohibits discrimination of individuals on the basis of their exercise of conscience in HHS-funded programs. On May 21, 2019, HHS published **the final rule** in the Federal Register. This rule is effective July 22, 2019.

This final rule replaces a 2011 rule<sup>[1]</sup> with the aim of strengthening the enforcement of conscience and anti-discrimination laws protecting certain health care providers who refuse to participate in health care services they find religiously or morally objectionable.<sup>[2]</sup> The rule implements several statutory provisions which the final rule refers to collectively as the "Federal conscience and anti-discrimination laws" ("New Conscience Rule"). In general, these laws provide conscience protections to certain employees when those employees refuse to participate in the provision of certain services, such as abortion, sterilization, the provision of compulsory health care services generally (e.g., vaccinations) or the performance of advanced directives and the provision of assisted suicide.

### IS YOUR ORGANIZATION IMPACTED BY THE NEW CONSCIENCE RULE?

All employers who receive funding from HHS are subject to the New Conscience Rule. If your organization receives Medicare, Medicaid or HHS program-specific grants, you are impacted.

### CAN YOU BE SUED FOR VIOLATION OF THE RULE?

There is no private right of action under the New Conscience Rule. This means that an employee cannot sue an employer on the basis of a violation. The New Conscience Rule does, however, allow any employee, person or entity – including those whose individual rights were not potentially violated – to file a complaint with OCR. The rule also requires OCR to promptly investigate all complaints that indicate a threatened, potential or actual failure to comply. Be aware that the New Conscience Rule does not change an employee's existing remedies under Title VII of the Civil Rights Act and applicable state anti-discrimination laws (e.g. those protecting against religious discrimination and harassment) and increased attention on these rights may result in increased employee charges thereunder.

### WHAT IS THE PENALTY FOR VIOLATING THE RULE?

Penalties for noncompliance can include temporary or permanent withholding, denial or termination of federal financial assistance or other federal funds, referral to the U.S. Attorney General to enforce rights of the United States or any other remedies legally available. Noncompliance would be published and therefore could also jeopardize an entity's employee, patient and community relationships.

### ARE THERE POSTING/OTHER REQUIREMENTS FOR EMPLOYERS?

In addition to complying with their statutory obligations, the New Conscience Rule requires covered employers to maintain records, cooperate with OCR's investigations and compliance reviews and submit written assurances and certifications of compliance to HHS. The rule also prohibits retaliation against those asserting their rights.

While employers are not required to post a notice of rights, a voluntary posting is encouraged by the rule.<sup>[3]</sup>

### PRACTICAL TAKEAWAYS

- Health care employers may not refuse to hire someone, exclude an employee from an area of practice, terminate employment, demote an employee, deny benefits to an employee, impose a penalty on an employee or otherwise adversely treat an employee on the basis of

his or her protected objections.

- Health care employers may provide reasonable accommodations to protected employees, and it does not, by itself, constitute discrimination if an employee is offered and voluntarily accepts an effective accommodation. For example, if an employer offers an RN a comparable assignment in a different wing of a hospital, and the RN voluntarily accepts the assignment, then the accommodation itself would not constitute discrimination. If the RN is singled out among staff that he or she was reassigned because of his or her conscientious objections in a retaliatory way, then this could constitute discrimination. Note: accommodation is optional under the New Conscience Rule – not mandated, but only resolves the conflict if the employee agrees to accept the accommodation. If the employee refuses the accommodation, the employer may not take adverse action.
- The New Conscience Rule permits a health care employer to require its protected employees to disclose religious objections once they are hired if there is a reasonable likelihood that the protected employee may be asked in good faith to perform, refer for, participate in or assist in the performance of, any act or conduct to which he or she has a moral or religious objection.
- It is not discrimination under the New Conscience Rule if covered employers use alternate staff or methods to provide or further any objected-to conduct to patients if the employer does not require the objecting employee to take additional action or if the employer does not adversely treat the employee, including exclusion of the employee from areas of practice on the basis of the protected objections. In other words, the objecting RN may be replaced in the OR for that procedure but cannot be transferred to a different medical or surgical floor without the employee's agreement.
- Health care entities subject to the prohibitions of the New Conscience Rule may inform the public of the availability of alternate staff or methods to provide or further the objected-to conduct to patients, but they may not do so in a manner that constitutes adverse or retaliatory action against an objecting person. For example, a health care entity may post a notice in the reception area that alternate staff may be available, but it may not single out staff members with conscientious objections by name in a way that is retaliatory.
- It is yet to be seen how broadly the New Conscience Rule will be interpreted. Commenters to the rule expressed confusion as to how the Emergency Medical Treatment and Active Labor Act and federal anti-discrimination statutes, such as section 1557 of the Patient Protection and Affordable Care Act ("ACA") will interact. For example, would the rule allow an employee to refuse to treat certain patients protected by Section 1557 of the ACA if providing health services to them conflicts with the employee's religious directives? In response to those commenters, OCR stated that it intends to interpret the federal statutes "in harmony to the fullest extent possible to ensure maximum compliance with the terms of each law." Hall Render will continue to keep you updated on these interpretations.

If you have questions about the New Conscience Rule, please don't hesitate to contact:

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[1] Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, **76 Fed. Reg. 9,968** (Feb. 23, 2011)(replacing a 2008 rule); **2019 Proposed Rule**

[2] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, unofficial version available [here](#).

[3] 45 C.F.R. § 88.6(e).