



DHHS Adopts New Provider Conscience Rights Rule

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PRACTICE AREAS

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On Friday, December 19, 2008, the Department of Health and Human Services ("DHHS") issued a final rule to ensure that federally funded health care providers, including individual physicians and institutional providers, may safely decline to participate in certain health services because of their religious, moral, ethical, or other beliefs. This provider conscience rights rule takes effect on January 18, 2009, and prohibits federal fund recipients from discriminating against an entity or person that refuses to train to perform, participate in, or refer anyone for any lawful health service (such as abortion or sterilization) or research activity. See 45 CFR § 88.4(c)(1), 78072 Federal Register, Vol. 73, No. 245, December 19, 2008.

The rule clarifies that these nondiscrimination protections apply to institutional health care providers, as well as individual employees working for federally funded health care providers. Protection extends to trainees, applicants, and those who may "assist in the performance" of the objectionable procedures. Entities that violate the regulations could lose federal funding or even be required to reimburse already-distributed funds. Complaints alleging violations under the final rule may be filed with the DHHS Office for Civil Rights.

Recipients of federal funds must certify compliance with the final rule in a manner yet to be determined. DHHS may phase in the final rule's written certification requirement through October 1, 2009, to determine how best to implement this certification requirement. It does appear that DHHS will notify recipients of federal funding of the certification requirement at the time of award through a request for proposal, request for agreement, provider agreement or other announcement of funding. DHHS also stated that it will attempt to integrate the certification requirements under this rule into existing forms that are required to be filed with any federal funding documentation.

DHHS comments to the final rule contain the following guidance:



- Reassignment or transfer of an employee who states a religious or moral objection to a certain activity (such as abortion) may be deemed unlawful discrimination under the final rule.
- The Department declined to define the terms "religious belief" and "moral conviction," because the common definitions are plainly understood and the Department intends that "common sense interpretations apply."
- The Department declined to state how health care professionals should properly communicate information about individual conscience objections to employing entities and to patients. The Department strongly encourages "early, open and mutual respectful communication of conscience concerns that may arise in the provision of medical services, including between employees and employers as well as between providers and patients."
- An employer is only required to attempt to reasonably accommodate its current or prospective employees' religious objections if this would not place an undue burden on the employer. The Department noted that "a job applicant with a seriously held religious belief or moral conviction against a lawful health service or activity would be unlikely to apply for a job in which that precise health service or activity constituted a significant majority or the entirety of the job."

These and other comments may be reviewed at: <http://edocket.access.gpo.gov/2008/pdf/E8-30134.pdf>.

Legislative action is already pending to prohibit the enforcement or implementation of this new rule. It is not clear whether such action will be finalized before the rule's January 18, 2009 effective date.

In sum, this new regulation adds another level of considerations, pre- and post-hire, for employers who receive federal funds in the health care industry. The rule does not specifically require a posting, but health care employers may wish to consider an addition to their anti-discrimination policies confirming their intent to comply with the regulations, once it is clear that pending legislation will not stop the rule's enforcement.