

FEDERAL COURT STRIKES DOWN HHS “CONSCIENCE RULE,” SPARKING HEATED RHETORIC AND POTENTIAL CONFUSION

Insights
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A New York federal judge just struck down a rule that was about to permit the government to withhold federal funds from healthcare providers that don't allow workers to refuse to perform procedures because they violate their religious beliefs or conscience. Judge Paul Engelmayer's 147-page ruling, handed down yesterday, has led to heated reactions and spin from both sides of the controversy. However, the decision may not have a big effect on the daily operations of healthcare institutions and employees who want to be excused from participating in certain procedures. Similar laws and accreditation requirements remain in effect.

BACKGROUND: THE “CONSCIENCE RULE,” EXPLAINED

Set to take effect on November 22, the rule would have granted the Department of Health and Human Services (HHS) authority to revoke federal funding to hospitals, dentists' offices, ambulance services, and other entities that did not permit employees to opt out of procedures on the basis of religious or conscience objections. It would have also affected family planning clinics, community groups that provide HIV treatment, state and local governments, and medical schools.

While proponents called it a “conscience rule,” opponents referred to it as a “health care refusal rule.” At least 19 states and other groups filed suit to block its implementation, contending that it permitted discrimination against women exercising reproductive rights, and gay and transgender patients. “The refusal-of-care rule was an unlawful attempt

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to allow healthcare providers to openly discriminate and refuse to provide necessary health care to patients based on providers' religious beliefs and moral objections," NY Attorney General Letitia James stated. "Healthcare is a basic right that should never be subject to political games." Alexa Kolbi-Molinas, a staff attorney at the American Civil Liberties Union, said that "religious beliefs do not include a license to discriminate, deny essential care, or to cause harm to others."

Supporters of the rule disagreed. Stephanie Taub, senior counsel for First Liberty Institute, said, "The court's decision leaves healthcare professionals across America vulnerable to being forced to perform, facilitate, or refer for procedures that violate their conscience." Among the procedures most often mentioned are abortions and sterilizations, as well as administering vaccines derived from fetal tissue. Roger Severino, a lawyer formerly with the Justice Department's Civil Rights Division, reportedly said that doctors, nurses, and other with deeply held religious beliefs had been coerced into violating their principles on abortion or assisted suicide.

WHAT DOES THIS MEAN FOR HEALTHCARE PROVIDERS?

Potentially lost in the heated rhetoric is the fact that existing laws and accreditation rules already contain provisions that require healthcare facilities to establish and follow protocols permitting healthcare workers to opt out of procedures that violate their religious beliefs. Importantly, these protocols typically require first securing coverage by another qualified worker who does not object to participating in the procedure before a worker is excused from participating. Thus, patient care remains the first priority.

As one example of existing protections that already existed, and still exist, Title VII of the Civil Rights Act prohibits discrimination on the basis of religion. The law requires employers to accommodate employees' religious beliefs and practices unless the accommodation would impose an "undue hardship" on the employer. In fact, among examples of accommodations that the law may require, the Equal Employment Opportunity Commission (EEOC) has cited excusing a Christian pharmacist from being required to fill birth control prescriptions. Somewhat akin to consideration of accommodations under the Americans with Disabilities

Act (ADA), these situations must be evaluated on an individualized basis.

Thus, despite the hyperbole and passion tied to this issue, healthcare employers should – at the least for time being – continue to follow your existing policies regarding consideration and accommodation when caregivers or other employees raise objections to participating in a procedure based upon their sincerely held religious beliefs.

[ED. NOTE: A SECOND FEDERAL JUDGE ISSUED A RULING SHORTLY AFTER PUBLICATION OF THIS ALERT THAT ALSO INVALIDATED THE CONSCIENCE RULE. JUDGE STANLEY A. BASTIAN OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON ISSUED AN OPINION FROM THE BENCH ON NOVEMBER 7 MIRRORING THE NEW YORK JUDGE'S DECISION. MEANWHILE, A FEDERAL JUDGE IN CALIFORNIA IS ALSO EXPECTED TO ISSUE A DECISION ON THE MATTER SOON, FURTHER CEMENTING THE FACT THAT THE RULE WILL NOT GO INTO EFFECT ON THE PLANNED NOVEMBER 22 EFFECTIVE DATE.]

We will continue to monitor further developments and provide updates, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our [Healthcare Practice Group](#).

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