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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. During the 108th Congress, S. 1397, an abortion conscience clause bill, was introduced in the Senate, and a companion bill, H.R. 3664, was introduced in the House. Although neither of these bills were enacted, Congress did pass appropriations legislation that contained a conscience clause provision. This report describes the history of the conscience clause as it relates to abortion law and provides a legal analysis of the effects of such laws, including the provision contained in P.L. 108-447, the Consolidated Appropriations Act, 2005. Legislators are likely to consider similar legislation during the 109th Congress.

Historical Background

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 contraception 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 on religious or moral grounds. This section details both the history and current state of conscience clause laws regarding abortion.

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

Passed in 1973, the Church Amendment was the first conscience clause enacted into law. Responding to the Supreme Court's decision to legalize abortion in *Roe v. Wade*,[2] Congress quickly passed the amendment,[3] which states that public officials may not require individuals or entities who receive certain public funds to perform abortion or sterilization procedures or to 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."[4] This law, which remains in force today, applies to any individual or entity that receives federal financial assistance under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act. The law further prohibits entities that receive federal funds under these statutes or under a biomedical or behavioral research program administered by the Department of Health and Human Services from engaging in employment discrimination against doctors or other medical personnel who either perform abortion or sterilization procedures or who refuse to perform such procedures on moral or religious grounds.[5]

By 1978 – five years after the decision in *Roe v. Wade* – virtually all of the states had enacted conscience clause legislation in one form or another.[6] 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,[7] it adopted the Danforth amendment, which mandated neutrality with respect to abortion. Specifically, the amendment clarified that Title IX of the Education Amendments of 1972,[8] which prohibits sex discrimination in federally funded education 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 enacted additional conscience clause legislation in the Omnibus Consolidated Rescissions and Appropriations Act of 1996.[10] Under this law, which amended the Public Health Service Act, the federal government and state and local governments are prohibited from discriminating against health care entities that refuse to undergo abortion training, to

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[2] 410 U.S. 113 (1973).

[3] The amendment was enacted as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45.

[4] 42 U.S.C. § 300a-7(b).

[5] *Id*. at § 300a-7(c).

[6] Rachel Benson Gold, *Conscience Makes a Comeback In the Age of Managed Care*, The Guttmacher Report on Public Policy (Feb. 1998).

[7] Pub. L. No. 100-259.

[8] 20 U.S.C. § 1681 et seq.

[9] *Id*. at § 1688.

[10] Pub. L. No. 104-134.

provide such training, to perform abortions, or to provide referrals for such training or abortions.[11]

One year later, Congress again revisited the abortion conscience clause issue when it enacted the Balanced Budget Act of 1997.[12] Concerned that managed care plans might seek to prevent doctors from informing patients about medical services not covered by their health plan, Congress amended the federal Medicaid and Medicare 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.[13] 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 Medicaid or Medicare 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.[14]

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 Medicaid and Medicare programs. Furthermore, the new conscience clause law is broader because it allows Medicaid and Medicare-funded health plans to refuse to provide counseling and referral for abortion-related services, whereas earlier conscience clause laws permitted providers to opt out only of the actual provision of such services.[15] As a result, the 1997 provision may potentially 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.

Recent Legislation and its Effect on Existing Law

Two bills that would expand the scope of existing conscience clause legislation were introduced during the 108th Congress. Although neither of these bills — S. 1397 and H.R. 3664 — were enacted, Congress did pass appropriations legislation that contains a conscience clause provision.

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[11] 42 U.S.C. §238n(a)(1).

[12] Pub. L. No. 105-33. The Medicare conscience clause provision is codified as amended at 42 U.S.C. § 1395w-22(j)(3)(B), and the identical Medicaid conscience clause provision is codified as amended at 42 U.S.C. § 1396u-2(b)(3)(B).

[13] 42 U.S.C. § 1395w-22(j)(3)(A); 42 U.S.C. 1396u-2(b)(3)(A).

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

[15] 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).

As noted above, the 1996 conscience clause law prohibits the federal government and state and local governments from discriminating against health care entities that refuse (1) to undergo abortion training, (2) to provide such training, (3) to perform abortions, or (4) to provide referrals for such training or abortions.[16] This nondiscrimination law 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.[17] Although often referred to as a conscience clause law, this provision is somewhat different from traditional conscience clauses because medical providers can refuse to provide training or services for any reason, not just on moral or religious grounds.

Under the law enacted in 1996, the definition of "health care entity" includes individual physicians, postgraduate physician training programs, and participants in health professions training programs.[18] Recent legislation, however, has proposed to expand this definition, thereby resulting in a broader range of entities that could legally refuse to provide abortion training or services without fear of losing federal funding or accreditation. Supporters of such legislation argue that such expansion 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, on the other hand, argue that such legislation would impose serious restrictions on women's access to abortion. Critics also note that such legislation 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.[19]

During the 108th Congress, legislators introduced two bills that would have expanded the abortion nondiscrimination exemption in such a fashion. Known as the Abortion Non-Discrimination Act (ANDA), H.R. 3664 and its companion measure, S. 1397, would have expanded the definition of "health care entity" to include other health professionals, hospitals, provider sponsored organizations, health maintenance organizations (HMOs), health insurance plans, or any other kind of health care facility, organization, or plan. Neither of these two bills were enacted.

After H.R. 3664 and S. 1397 stalled in the House and Senate, however, a similar conscience clause provision was inserted into the appropriations bill for the Departments of Labor, Health and Human Services (HHS), and Education, which was eventually enacted as part of the Consolidated Appropriations Act, 2005.[20] This legislation, which is very similar to ANDA, provides: "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,

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[16] 42 U.S.C. § 238n(a)(1).

[17] *Id*. at § 238n(b)(1).

[18] *Id*. at § 238n(c)(2).

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

[20] P.L. 108-447, Division F, § 508(d).

provide coverage of, or refer for abortions."[21] Under the legislation, the definition of "health care entity" includes "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."[22]

Like previous law, the effect of this legislation is to prevent 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. The appropriations legislation, however, greatly increases both the number and type of health care providers and professionals who may refuse to provide abortion training or services without reprisals. For example, previous 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 education setting or to doctors in their individual practices. The new legislation, on the other hand, allows large health insurance companies and HMOs to refuse to provide coverage or pay for abortions. Since an HMO's refusal to provide abortion-related services would affect a much larger number of patients than would an individual doctor's refusal to provide such services, the new legislation may result in a denial of abortion-related services to a significantly expanded number of individuals.

Although the new appropriations legislation is similar to the proposed ANDA, it differs in two important respects. First, ANDA would have denied all federal funds to entities that engaged in abortion-related discrimination, but the new legislation denies only those funds available under the Labor/HHS appropriations bill. Second, the passage of ANDA would have resulted in permanent legislation, while the new appropriations legislation will remain in effect for one year only, unless Congress enacts a similar provision in future appropriations bills. Thus, although the new conscience clause legislation is a significant expansion of previous law, it provides for smaller penalties and may be temporary in nature. Congress is likely to consider similar legislation during its 109th session.

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[21] *Id.*

[22] *Id.*