Health Care Providers' Religious Objections to Medical Treatment: Legal Issues Related to Religious Discrimination in Employment and Conscience Clause Provisions

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Summary

Federal law provides various legal protections for individuals who object for religious reasons to performing certain tasks required by their employer. The First Amendment to the U.S. Constitution and statutory nondiscrimination laws provide general protection to individuals wishing to exercise their religious beliefs without interference from the government or employers. An individual's right of refusal may also be protected by specific legislation known as "conscience clauses." These protections often arise with health care providers, including doctors and pharmacists, who object to assisting with certain reproductive procedures or dispensing birth control. Most often, objections are raised by doctors or hospitals who object to performing abortion procedures because of religious beliefs or affiliations.

Medical providers with religious objections to certain treatments highlight the tension between patients' access to treatment and health providers' religious freedom. In a recent example of this debate, December 2008, the Department of Health and Human Services (HHS) issued a final rule to ensure compliance with conscience clauses enacted beginning in the 1970s to protect individuals who object to abortion and other procedures. The rule took effect on January 20, 2009, but was subsequently partially rescinded by the Obama Administration in February of 2011, based on concerns that a broad reading of the 2008 final rule could be interpreted to limit patients' access to certain health care services.

This report will discuss situations in which religious objections may be raised in health care. The report will examine the legal protections for individuals with religious and moral objections to their employment duties offered by the Free Exercise Clause of the First Amendment, Title VII of the Civil Rights Act of 1964, and federal conscience clauses. Finally, the report will analyze the two sets of protections and how they may affect health care providers who have religious objections to medical procedures.

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Background

Federal law provides various legal protections for individuals who object for religious reasons to performing certain tasks required by their employer. The First Amendment to the U.S. Constitution and statutory nondiscrimination laws provide general protection to individuals wishing to exercise their religious beliefs without interference from the government or employers. In addition to religious freedom and anti-discrimination laws, an individual's right of refusal may be protected by specific legislation known as "conscience clauses." These protections often arise with health care providers, including doctors and pharmacists. For example, certain pharmacists have raised religious objections to filling prescriptions for birth control medications because their religious beliefs forbid the use of certain contraceptives. Additionally, in 2000, two California fertility doctors refused to perform certain artificial insemination procedures because of their religious objections to the patient's sexual orientation and un-married status.[1] Most often, though, objections are raised by doctors or hospitals who object to performing abortion procedures because of religious beliefs or affiliations.

Medical providers with religious objections to certain treatments highlight the tension between patients' access to treatment and health providers' religious freedom. In a recent example of this debate, December 2008, the Department of Health and Human Services (HHS) issued a final rule to ensure compliance with conscience clauses enacted beginning in the 1970s to protect individuals who object to abortion and other procedures.[2] The rule took effect on January 20, 2009, but was subsequently partially rescinded by the Obama Administration in February of 2011, based on concerns that a broad reading of the 2008 final rule could be interpreted to limit patients' access to certain health care services.[3]

This report will discuss situations in which religious objections may be raised in health care.[4] The report will examine the legal protections for individuals with religious and moral objections to their employment duties offered by the Free Exercise Clause of the First Amendment, Title VII of the Civil Rights Act of 1964, and federal conscience clauses. Finally, the report will analyze the two sets of protections and how they may affect health care providers who have religious objections to medical procedures.

[1] *See* North Coast Women's Care Medical Group, Inc. v. Superior Court of San Diego County, 44 Cal. 4th 1145 (Cal. 2008) (holding that the constitutional right to religious exercise does not exempt a physician from complying with California's state civil rights nondiscrimination statute which prohibits discrimination based on a person's sexual orientation).

[2] 73 Fed. Reg. 78072 (Dec. 19, 2008). For a history of abortion conscience clause laws, *see* CRS Report RL34703, *The History and Effect of Abortion Conscience Clause Laws*, by (name redacted).

[3] 76 Fed. Reg. 9968, 9974 (Feb. 23, 2011).

[4] This report is limited to objections raised in the medical field. However, the relevant legal issues would apply similarly to other fields in which public servants may object to certain tasks based on religious beliefs. *See* Endres v. Indiana State Police, 349 F.3d 922 (7th Cir. 2003) (police officer challenging his dismissal after he refused to work at a casino because his religious beliefs hold gambling to be a sinful enterprise).

Legal Protections for Medical Providers Who Refuse to Provide Medical Care

Religious Freedom Protections

The First Amendment of the U.S. Constitution and the Religious Freedom Restoration Act of 1993 provide general protection for individuals' religious exercise. These laws generally restrict governmental entities from interfering with individuals' religious beliefs and practices. Title VII of the Civil Rights Act of 1964 provides nondiscrimination protection for individuals in the context of their employment. Title VII restricts both governmental entities and private entities from discriminating against employees because of the employees' religious exercise.

First Amendment Protection of Religious Exercise

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law ... prohibiting the free exercise [of religion]."[5] The Free Exercise Clause prohibits the government from interfering with an individual's exercise of his or her religious beliefs unless the resulting burden imposed on the individual arises from a valid and neutral law of general applicability.[6] That is, if the law applies to all individuals without regard to their religion, the law would be considered a neutral law of general applicability. Under the First Amendment, if an individual's exercise of religion is burdened by such a law, that burden does not violate the Free Exercise Clause.

Religious Freedom Restoration Act of 1993

The constitutional protections for religious exercise have been augmented by the enactment of the Religious Freedom Restoration Act of 1993 (RFRA).[7] RFRA prohibits federal government action that has the effect of substantially burdening religious practice.[8] RFRA provides that a statute or regulation of general applicability could lawfully burden a person's exercise of religion only if it were shown to further a compelling governmental interest and to be the least restrictive means of furthering that interest.[9] This statutory requirement for any federal law, including those of general applicability not aimed at religious practice, supplements the constitutional protection, which prohibits only government action that intentionally burdens the exercise of religion.

[5] U.S. Const. amend. I. For a legal analysis of the First Amendment's requirements for religious exercise, *see* CRS Report RS22833, *The Law of Church and State: General Principles and Current Interpretations*, by Cynthia Brougher.

[6] *See* Employment Div., Oregon Dep't of Human Resources v. Smith, 494 U.S. 872, 879 (1990).

[7] P.L. 103-141, 103rd Cong., 1st Sess. (November 16, 1993); 42 U.S.C. § 2000bb *et seq*.

[8] RFRA originally applied to federal, state, and local government actions. The Supreme Court held that the application of RFRA to state and local government was unconstitutional under principles of federalism. *See* City of Boerne, Texas v. Flores, 521 U.S. 407 (1997).

[9] P.L. 103-141, § 3; 107 Stat. 1488, 1488-89; 42 U.S.C. § 2000bb-1.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 provides statutory protections for individuals based on their religion in the context of their employment.[10] Specifically, Title VII prohibits employers, including both governmental and private entities, from basing employment decisions (including hiring and firing, or decisions regarding compensation, terms, conditions, or privileges of employment) on an employee's religion.[11] Under Title VII, religion is defined to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[12] Religious practices and observances are generally considered "to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."[13]

Reasonable Accommodations Without Undue Hardship

Thus, the general prohibition on discrimination based on religion in Title VII requires the employer to make reasonable accommodations for employees' observance of their religion if such accommodations would not cause undue hardship to the employer. Equal Employment Opportunity Commission (EEOC) regulations provide guidelines for what constitutes reasonable accommodation and undue hardship. Once an employee requests religious accommodation, the employer must consider whether the requested accommodation is reasonable or what reasonable alternatives might be provided.[14] If more than one accommodation is possible without causing undue hardship, the EEOC determines the reasonableness of the chosen accommodation by examining the alternatives considered by the employer and the alternatives actually offered to the employee.[15] If more than one manner of accommodation would not cause undue hardship, "the employer ... must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities."[16]

In order for these accommodations to be required under Title VII, they must not cause undue hardship to the employer. Employers cannot claim undue hardship on "a mere assumption that many more people ... may also need accommodation."[17] The regulations provide two general bases that may justify undue hardship: cost and seniority rights.[18] An employer may refuse to

[10] 42 U.S.C. § 2000e et seq. For a legal analysis of Title VII's protections for religious exercise, *see* CRS Report RS22745, *Religion and the Workplace: Legal Analysis of Title VII of the Civil Rights Act of 1964 as It Applies to Religion and Religious Organizations*, by Cynthia Brougher.

[11] 42 U.S.C. § 2000e-2(a)(1).

[12] 42 U.S.C. § 2000e(j).

[13] 29 C.F.R. § 1605.1. *See* United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970); *see also* Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

[14] *See* 29 C.F.R. § 1605.2.

[15] 29 C.F.R. § 1605.2(c)(2).

[16] *Id*. *See also* Ansonia Board of Education v. Philbrook, 479 U.S. 60, 67-69 n. 6 (1986) (holding that Title VII does not require "an employer to choose any particular reasonable accommodation" but also noting a distinction between the lower court's ruling and the explicit limitation included in the EEOC regulations).

[17] 29 C.F.R. § 1605.2(c)(1).

[18] 29 C.F.R. § 1605(e). *See also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

accommodate an employee's religious practice if "the accommodation would require more than a de minimis cost."[19] The EEOC determines whether an accommodation exceeds a de minimis cost by evaluating the cost incurred to the employer and the number of employees that will need the accommodation.[20] The regulations also provide that "undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system."[21]

The U.S. Supreme Court has held that Title VII's protection of religion does not require an accommodation that would cause more than minimal hardship to the employer or other employees.[22] The Court has also held that Title VII requires employers to work with employees to find a reasonable alternative that would accommodate the employee's objection.[23] However, Title VII does not require "an employer to choose any particular reasonable accommodation."[24] That is, the accommodation offered to the employee need not be the most reasonable one, the one requested by the employee, or the one that imposes the least burden on the employee.[25]

Accommodations for Health Care Providers Under Title VII

EEOC guidance issued in July 2008 specifically addressed the application of Title VII's accommodation requirements in the context of pharmacists who object to dispensing contraceptives because of their religious beliefs.[26] Under Title VII, a pharmacist who is employed by a pharmacy with multiple pharmacists and who objects to distributing contraceptives or assisting customers with questions about contraceptives may signal another pharmacist to assist the customer. However, the pharmacist would not be permitted to ignore customers with contraceptive requests or questions. According to the EEOC regulations and guidance, "the employer is not required to accommodate [a pharmacist's] request to remain in [the position] yet avoid all situations where he might even briefly interact with customers who have requested contraceptives, or to accommodate a disruption of business operations. The employer may discipline or terminate [the pharmacist] for not meeting legitimate expectations."[27]

Another common employment task to which health care providers may object based on their religious beliefs is the performance of or assistance in abortion procedures. Courts have struck a similar balance in accommodating medical staff with religious objections to abortion as the

[19] 29 C.F.R. § 1605.2(e)(1) (internal quotations omitted).

[20] *Id*.

[21] 29 C.F.R. § 1605.2(e)(2).

[22] *See Trans World Airlines, Inc*., 432 U.S. at 84; *Ansonia Board of Education*, 479 U.S. at 67-69.

[23] *See Ansonia Board of Education*, 479 U.S. at 68-69 (internal citation omitted).

[24] *Id*. at 68.

[25] *Id.* at 68-69 (noting that the lower court interpreted EEOC guidelines to require a certain accommodation). The Court stated that "though superficially consistent with the burden imposed by the Court of Appeals, this guideline, by requiring the employer to choose the option that least disadvantages an individual's *employment opportunities*, contains a significant limitation not found in the court's standard. To the extent that the guideline ... requires the employer to accept any alternative favored by the employee short of undue hardship, we find the guideline simply inconsistent with the plain meaning of the statute." *Id*. at n. 6.

[26] EEOC Compliance Manual, No. 915.003, July 22, 2008, *available at* http://www.eeoc.gov/policy/docs/religion.html.

[27] *Id.* at § 12-IV.C.3 (Examples 43 and 44).

EEOC interpretation suggests in the context of pharmacists and contraceptives.[28] That is, courts have required that employees with religious objections to abortion procedures be provided any reasonable accommodation that would resolve the staff member's objection without undue hardship to the employer. Accordingly, employees with religious objections to abortion procedures likely would be allowed to trade tasks with other employees or be reassigned within the hospital to avoid such procedures. However, in situations where such accommodations would not be possible (e.g., emergency procedures) the employee would not be permitted to refuse to perform required duties because to do so would cause hardship to the employer and the employer's clients (in this case, patients).

For example, a federal appellate court held that a hospital had complied with Title VII when it offered alternative employment tasks or positions to a nurse who objected to assisting in abortion procedures.[29] The nurse worked in the delivery unit of the hospital, which did not perform elective abortions. Because the nurse had religious objections to abortion, she refused to assist in emergency procedures that she considered to be abortions and instead traded assignments to avoid participating in the procedures she considered objectionable. However, when the nurse refused to assist in a particular procedure and a substitute was not immediately available to replace her, the hospital determined that her refusal to assist in such circumstances risked the safety of the patient. To accommodate the nurse's religious objection, the hospital suggested a transfer to a different operating unit or to another available position. The nurse refused and the hospital terminated her employment. The court rejected the nurse's claim that the hospital violated Title VII. Noting that Title VII was intended to foster cooperation to avoid objections by the employee and hardships to the employer, the court held that, because the nurse refused to cooperate with the accommodations offered to her, she could not claim that the hospital's actions were legally inadequate.[30] The court noted that public protectors (e.g., police, firefighters, and public health care providers) "must be neutral in providing their services" and that "public trust and confidence requires that a public hospital's health care practitioners ... will provide treatment in time of emergency."[31]

Federal Conscience Clauses

In contrast with the broad religious protections offered by Title VII, federal conscience clauses can be described as narrower pieces of legislation that apply only to specific recipients of federal funds. The scope of federal conscience clauses not only varies with respect to their applicability, but also with respect to the scope of protections offered. For example, the majority of federal conscience clauses deal only with refusals to perform, provide, or pay for certain reproductive procedures, rather than any procedure to which an individual might have a religious objection.

[28] *See, e.g.,* Shelton v. Univ. of Medicine and Dentistry of New Jersey, 223 F.3d 220 (3rd Cir. 2000); Grant v. Fairview Hospital and Healthcare Services, 93 Fair Empl. Cas. (BNA) 685 (D. Minn. 2004); Benson v. Schwarga, 1997 U.S. Dist. LEXIS 684 (E.D. Va 1997).

[29] *Shelton*, 223 F.3d 220 (3rd Cir. 2000).

[30] *Id*. at 228.

[31] *Id*.

Church Amendment

The Church Amendment, named for its principal sponsor, Senator Frank Church, was enacted in 1973 to protect conscientious objections to abortion and sterilization.[32] The inclusion of abortion refusal was likely a response to the Supreme Court's ruling in *Roe v. Wade*. However, the inclusion of objections to sterilization was instigated by a lower court decision, *Taylor v. Saint Vincent's Hospital*.[33] This case dealt with a couple in Billings, Montana, who were seeking a tubal ligation concurrently with a scheduled caesarean delivery.[34] At the time, the maternity wards serving the Billings area had been consolidated on the grounds of a Catholic hospital which, as a policy, prohibited surgical sterilizations. The couple sued under 42 U.S.C. § 1983 alleging a deprivation of a federal right by a person acting under color of state law. Because the hospital had received funds under the Hill-Burton act, the court found sufficient jurisdiction and issued a preliminary injunction allowing the sterilization procedure on the Catholic hospital's grounds.

Later that year, Congress enacted the Church amendment to prohibit the receipt of federal funds under the Public Health Service Act, and certain other statutes, from being used as grounds to compel providers or facilities to perform abortions or sterilizations. In light of this amendment, the court in Montana vacated its preliminary injunction although the procedure had long since taken place.[35]

The Church Amendment provides protections in the context of four different classes of recipients of federal funds. First, the receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act cannot be used to require an individual or entity to perform or assist[36] an abortion or sterilization procedure, or make facilities available for such procedures, if the performance of those procedures would be contrary to the religious beliefs or moral convictions of the recipient. Entities receiving federal funds also cannot be required to provide personnel to perform or assist with sterilization or abortion procedures if such assistance would be contrary to the religious beliefs or moral convictions of the personnel.[37] Furthermore, entities receiving assistance under the acts mentioned above are prohibited from discriminating in employment or the extension of staff privileges to physicians or health care personnel on the basis of an individual's nonperformance of sterilization or abortion procedures based on that individual's religious beliefs or moral convictions.[38]

Second, recipients of HHS grants for biomedical or behavioral research may not discriminate in employment or staff privileges on the basis of the refusal to perform or assist "*any* lawful health service or research activity" on religious or moral grounds.[39] This clause applies to a more

[32] P.L. 93-45, § 401, codified at 42 U.S.C. § 300a-7.

[33] 369 F. Supp. 948 (D. Mont. 1973).

[34] Performing these procedures simultaneously eliminates the need to have a second surgical procedure.

[35] *Taylor v. St. Vincent's Hosp.*, 523 F.2d 75, 76 (9th Cir. 1975).

[36] The statutory text of the Church Amendment does not identify what conduct constitutes assistance for these purposes.

[37] 42 U.S.C. § 300a-7(b).

[38] 42 U.S.C. § 300a-7(c)(1). This clause also provides a reciprocal prohibition against discrimination on the basis of an individual's performance of abortion or sterilization.

[39] 42 U.S.C. § 300a-7(c)(2) (emphasis added). Discrimination on the basis of an individual's performance of a lawful health service or activity is also prohibited.

specific category of recipients of federal funds than the first Church category, but also protects refusals based on conscience in procedures besides abortion or sterilization.

Third, no person may be compelled to perform or assist in a health service program funded in whole or in part by a program administered by HHS, if the procedure is contrary to the individual's religious beliefs or moral convictions.[40]

Fourth, recipients of any grant, contract, loan, loan guarantee, or interest subsidy under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Assistance and Bill of Rights Act of 2000 may not discriminate among applicants for training or study on the basis of the applicant's unwillingness to counsel, suggest, recommend, assist, or in any way participate in abortion or sterilization procedures on religious or moral grounds.[41]

Section 245 of the Public Health Service Act

Section 245 of the Public Health Service Act prohibits abortion-related discrimination in governmental activities regarding training and licensing of physicians. Specifically, the federal government and any state or local recipient of federal funds may not discriminate among health care entities based upon an entity's refusal to engage in abortion training.[42] This provision also prohibits discrimination in accreditation determinations on the basis of a failure to perform induced abortion, or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training.[43] The protections offered by this clause protect individual physicians, postgraduate physician training programs, and participants in a program of training in the health professions.[44] Unlike the provisions of the Church Amendment, there is no requirement under Section 245 that the refusal be made on the basis of a religious or moral objection.

Weldon Amendment

The Weldon Amendment, named for Representative Dave Weldon, has been regularly included in recent HHS appropriations legislation. It is not permanent legislation, but only applies to the funds appropriated in the respective act in which it appears. It prohibits federal agencies, states, and local governments that receive appropriated funds from discriminating among institutional or individual health care entities on the basis of a health care entity's refusal to provide, pay for, provide coverage of, or refer for abortions.[45] For purposes of the Weldon Amendment, the term ''health care entity'' includes individual physicians or other health care professionals, hospitals, provider-sponsored organizations, health maintenance organizations, health insurance plans, and any other kind of health care facility, organization, or plan.[46] As with Section 245 of the PHSA,

[40] 42 U.S.C. § 300a-7(d).

[41] 42 U.S.C. § 300a-7(e). Discrimination on the basis of an applicant's willingness to counsel, suggest, recommend, assist, or in any way participate in abortion or sterilization procedures is also prohibited.

[42] 42 U.S.C. § 238n(a). This provision is also known as the Coats Amendment.

[43] 42 U.S.C. § 238n(b).

[44] 42 U.S.C. § 238n(c)(2).

[45] *See*, *e.g.*, P.L. 111-8, div. F, § 508(d)(1).

[46] *Id.* at § 508(d)(2).

the Weldon Amendment has not historically required that the refusal be made for religious or moral reasons.

The text of the Weldon Amendment does not expressly limit its applicability to non-emergency abortions. Therefore, questions have arisen regarding how the Weldon Amendment would operate in situations where a hospital may be required to provide an emergency abortion under the Emergency Medical Treatment and Active Labor Act (EMTALA)[47] or state law. Shortly after the Weldon Amendment was first included in the annual Labor, HHS, and Education appropriations bill, the Attorney General of California sued the federal government alleging that the Weldon Amendment would prevent the state from insuring that emergency abortions would be provided, as required by state law. Therefore, the California Attorney General argued that the Weldon Amendment unconstitutionally interfered with the state's sovereignty. The court ultimately dismissed the claim as unripe, based in part on the lack of any expressed intent by HHS to enforce the Weldon Amendment in this way.[48] Furthermore, in response to the lawsuit, Representative Weldon argued on the floor of the House of Representatives that there was no conflict between his amendment and EMTALA (or the state equivalent of that statute). Instead, he stated that "it simply prohibits coercion in nonlife-threatening situations."[49] Therefore, there exists some support for the proposition that, despite any textual limitation, the Weldon Amendment does not bar either states or the federal government from requiring providers to perform emergency abortions in life threatening situations.

Other Federal Conscience Clauses

Other federal laws permit educational institutions or managed care organizations to refuse to pay for certain services that are contrary to the religious or moral beliefs of the institution or organization.[50] However, these laws are beyond the scope of this report as they do not provide protections for individual health care providers that refuse to perform services based on their individually held religious beliefs or moral conviction.

2008 HHS Final Rule and Partial Rescission

In 2008, HHS published a final rule (2008 Final Rule) "intended to ensure that, in the delivery of health care and other health services, recipients of [HHS] funds do not support coercive or discriminatory practices in violation of [federal health care conscience laws]."[51] The rule provided protections similar to those contained in the Church Amendment, section 245 of the Public Health Service Act, and the Weldon Amendment. The 2008 Final Rule also generally required recipients of federal funds to certify, in writing, that they were compliant with the provisions of the Final Rule.

Although the rule largely reiterated the language of these federal conscience clauses, there was at least one significant difference. The 2008 Final Rule provided a definition for "assist[ing] in the

[47] 42 U.S.C. § 1395dd.

[48] *California v. U.S.*, 2008 U.S. Dist. LEXIS 21258 (N.D. Cal., Mar. 18, 2008).

[49] 151 CONG. REC. H177 (daily ed. Jan. 25, 2005) (statement of Rep. Weldon).

[50] *See* CRS Report RL34703, *The History and Effect of Abortion Conscience Clause Laws*, by (name redacted), at 1-2 (discussing Danforth Amendment and Medicare and Medicaid amendments in the Balanced Budget Act of 1997).

[51] 73 Fed. Reg. 78072 (Dec. 19, 2008).

performance" of a procedure that encompassed the acts of counseling, referring, or training for a procedure. In contrast, the Church Amendment does not specify what conduct would constitute assistance in the performance of an abortion, leaving open the possibility that refusals to refer for abortion are not protected by the Church Amendment. Nevertheless, under the 2008 Final Rule, referring a patient for an abortion would have been considered assisting in the performance of an abortion.[52] Earlier versions of the rule also provided a definition for abortion, but the 2008 Final Rule was silent on that issue.

The rule took effect on January 20, 2009,[53] but the Obama Administration partially rescinded the regulation in 2011.[54] The 2011 rescission removed the definitions provided by the rule, the rule's recapitulation of the protections in the various federal health care conscience laws, and the certification requirement.[55] However, the portion of the rule designating the Office of Civil Rights within HHS to receive complaints of violations of the federal health care conscience laws was left intact.[56]

Patient Protection and Affordable Care Act

The Patient Protection and Affordable Care Act (PPACA) was a major piece of health care legislation enacted during the 111th Congress. Among other things, PPACA established state-based health insurance exchanges to provide a marketplace within which individuals and small employers could purchase private health insurance offered by qualified health plans.[57] PPACA includes a conscience clause to prohibit qualified health plans offered through an exchange from discriminating amongst individual health care providers or facilities on the basis of the refusal, for religious or moral reasons, to perform an abortion.[58] This prohibition would appear to regulate the conduct of private health insurers that may not be regulated by any of the existing federal conscience clauses, which are attached as conditions to the receipt of federal funds.

PPACA also prohibits certain public and private actors from engaging in discrimination amongst individual or institutional health care providers on the basis of the providers' objections to assisted suicide.[59] Physician-assisted suicide has been legal under Oregon state law since 1998.[60] In 2008, the voters of Washington state passed a ballot initiative legalizing physician-assisted

[52] The 2008 Final Rule was the center of controversy because of the effect that the regulation could have on the availability of certain services. Legislation was also introduced in the Senate to block the rule from taking effect. S. 20, 110th Cong. (2008).

[53] Challenges to the regulation were filed in federal district court on January 16, 2009, seeking court order to prevent the rule from taking effect and a decision to void the rule.

[54] 76 Fed. Reg. 9968 (Feb. 23, 2011).

[55] *Id.* at 9975. The respective protections provided by the Church Amendment, § 245 of the PHSA, and the Weldon Amendment are not affected by the partial rescission of the 2008 Final Rule.

[56] 45 C.F.R. § 88.2.

[57] 42 U.S.C. § 18021 *et seq*.

[58] 42 U.S.C. § 18023(b)(4).

[59] 42 U.S.C. § 18113(a). The provision would prohibit discrimination by the federal government; a state, local, or private recipient of funds authorized under the bill; and any health plan created under PPACA. This provision would protect objections to assisted suicide held by health care professionals, and hospitals, in addition to managed-care organizations and insurance plans. 42 U.S.C. § 18113(b).

[60] OR. REV. STAT. § 127.800.

suicide.[61] In 2009, the Supreme Court of Montana held that the state's criminal laws did not apply to physician-assisted suicide because the patient had consented to such treatment.[62]

Distinctions Between Legal Religious Protections and Conscience Clause Legislation

Federal legal protections for individuals with religious beliefs that conflict with employment duties differ. Title VII and the federal conscience clauses address the goal of preventing individuals from being forced to violate their religious beliefs in the course of their employment. However, the scope and enforcement mechanisms of Title VII and the federal conscience clauses provide varying degrees of protection.

Scope of Protections Offered

Title VII applies broadly, to governmental and private employers with 15 or more employees, to protect religious exercise in the workplace. It applies regardless of the nature of the belief, whether grounded in religion or morality. It would protect religious refusals of any job task, and is not limited to certain contexts. On the other hand, the federal conscience clauses are of limited applicability. They only prohibit discrimination by certain recipients of federal funds and also only prohibit discrimination on refusals to perform a relatively narrow scope of procedures.

It has been argued that conscience clause legislation is redundant and overlaps with the protections offered by Title VII. For instance, officials from the EEOC, including legal counsel appointed under the Bush Administration, argued that "the rule was unnecessary for the protection of employees and potentially confusing to employers."[63] Employees of entities covered by Title VII that also receive funds under programs subject to conscience clause legislation may appear to have a greater expectation of accommodation for their religious beliefs because their employers are subject to multiple laws requiring nondiscrimination. In other words, the employer would have a greater incentive to comply with their request for accommodation because the employer would otherwise lose federal funding. However, Title VII would apply regardless, and would guarantee the employee a reasonable accommodation if it did not pose more than a minimal hardship on the employer.

Some have argued that the currently pending HHS conscience clause regulation would contradict Title VII's protections. Under this argument, the balance struck by Title VII, requiring accommodations for employees to the extent that they do not pose undue hardship on employers, is abandoned by federal conscience clauses because they do not include the caveat that the accommodation cannot pose an undue hardship. Arguably, under the federal conscience clauses, if an employer who received designated federal funds were to refuse to accommodate individuals

[61] WASH. REV. CODE § 70.245.010 *et seq*.

[62] *Baxter v. State*, 354 Mont. 234 (2009). A lower court had held that the state constitution contained a right to receive and provide aid in dying, *Baxter v. State*, 2009 Mont. Dist. LEXIS 482 (Mont. Dist. Ct. Dec. 5, 2008), but the Montana Supreme Court declined to rule on constitutional grounds.

[63] Robert Pear, *Protests Over a Bush Rule To Protect Health Providers*, NY TIMES, November 18, 2008, at A14.

with religious objections, the federal funds would be withdrawn even if any such accommodation would have posed an undue hardship.

Methods of Enforcement and Remedies Available

Title VII provides specific remedies to correct unlawful employment discrimination. Individuals who believe they are the victims of employment discrimination must file a complaint with the EEOC, which is responsible for enforcing individual Title VII claims against private employers. The Department of Justice (DOJ) enforces Title VII against state and local governments, but may do so only after the EEOC has conducted an initial investigation.[64]

None of the federal conscience clauses expressly provide for an individual remedy. One might be implied, but at least two federal courts have held that the Church Amendment is enforceable only through withholding federal funds.[65] Enforcement does not appear to be available through private litigation. Therefore, an individual who has been the subject of discrimination in violation of the Church Amendment may not be able to pursue remedies such as reinstatement or back pay unless such violations also constitute violations of Title VII or state employment laws. This result is also likely with respect to the other federal conscience clauses, although no court has been presented with that question.

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[64] For more information on Title VII, see the EEOC website, http://www.eeoc.gov/, and the DOJ's Employment Litigation Section website, http://www.usdoj.gov/crt/emp/index.html.

[65] *Nead v. Bd. of Trs.*, 2006 U.S. Dist. LEXIS 36897 (C.D. Ill. June 6, 2006); *Moncivaiz v. Dekalb*, 2004 U.S. Dist. LEXIS 3997 (N.D. Ill. March 12, 2004).