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HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 1403 Protections of Medical Conscience
SPONSOR(S): Health & Human Services Committee and Healthcare Regulation Subcommittee, Rudman and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1580

FINAL HOUSE FLOOR ACTION: 84 **Y's** 34 **N's** **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/CS/HB 1403 passed the House on May 2, 2023 as CS/SB 1580.

Conscience protection laws protect individuals and entities from being required to perform services that violate their religious beliefs or moral convictions. CS/CS/HB 1403 enacts a conscience protection law for health care providers and payers. The bill establishes a health care payor right to decline to participate in any health care service, including treatment and research, that violates a sincerely held religious, moral or ethical belief. The bill requires health care providers and students to raise a conscience-based objection at the time the incident giving rise to the objection occurs or as soon as practical thereafter. The bill also requires health care providers to document the objection in the patient's medical record.

The bill prohibits individuals and entities from discriminating against a health care provider or payor on the basis of conscience-based objection. The bill authorizes the Attorney General to bring a civil action for damages, injunctive relief, or any other appropriate relief for any actual or threatened adverse action due to declining to participate in a health care service that violates the provider's or payor's conscience. The bill also provides civil immunity to health care providers and health care payors for exercising their right of conscience and provides whistleblower protections.

The bill authorizes the Attorney General to bring a civil action for damages, injunctive relief, or other appropriate relief for any actual or threatened adverse action due to declining to participate in a health care service that violates the provider's or payor's conscience.

The U.S. Constitution protects the right to freedom of expression from government interference. Government regulation based on the content of speech is presumptively invalid and is upheld only if it is: necessary to advance a compelling governmental interest; tailored to serve that interest; and the least restrictive means to establish that interest.

Current law authorizes regulatory boards and the Department of Health (DOH) to discipline health care practitioners for failure to adhere to the applicable standard of care and making misleading, deceptive, or fraudulent representations related to the practice of the licensee's profession. However, DOH and the boards have no authority to regulate constitutionally protected free speech.

The bill prohibits a board within the jurisdiction of DOH, or DOH if there is no board, from taking disciplinary action against a health care practitioner solely for exercising the constitutional right of free speech, including, but not limited to, speech via social media. The bill authorizes DOH to revoke approval of private specialty boards and recognizing agencies if these entities revoke a practitioner's certification based solely upon the practitioner exercising the constitutional right of free speech.

The bill has no fiscal impact on state or local governments.

The bill was approved by the Governor on May 11, 2023, ch. 2023-57, L.O.F., and will become effective on July 1, 2023.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present Situation

Medical Conscience

Conscience

Most definitions in the U.S. legal context broadly define conscience to include moral, ethical, or religious principles. Some scholars believe that the definition between religion and conscience is a distinction without a difference. Others have suggested that "the framers viewed 'free exercise of religion' and 'freedom of conscience' as virtually interchangeable concepts".[1] James Madison is credited with first identifying the right to conscience as fundamental and inalienable, "changing the Virginia Declaration of Rights from a mere statement of the principle of tolerance to the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual."[2] Freedom of conscience is a concept that has been highly valued since the founding of the United States.[3]

The Health Care Right of Conscience Act[4] in Illinois was the first state law of its kind and is model legislation in the conscience arena. That Act defines 'conscience' as "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of the possessor parallel to that filled by God among adherents to religious faiths."[5] Conscience cannot to be construed as merely one's ideas or opinions.[6]

Conscience Objections and Health Care Professional Ethics

The American Medical Association issued an opinion interpreting its' Code of Medical Ethics regarding the physician exercise of conscience in the practice of medicine.[7] Specifically, the AMA believes that physicians should:[8]

- Thoughtfully consider whether and how significantly an action (or declining to act) will undermine the physician's personal integrity, create emotional or moral distress for the physician, or compromise the physician's ability to provide care for the individual and other patients.
- Before entering into a patient-physician relationship, make clear any specific interventions or services the physician cannot in good conscience provide because they are contrary to the physician's deeply held personal beliefs, focusing on interventions or services a patient might otherwise reasonably expect the practice to offer.
- Take care that their actions do not discriminate against or unduly burden individual patients or populations of patients and do not adversely affect patient or public trust.
- Be mindful of the burden their actions may place on fellow professionals.
- Uphold standards of informed consent and inform the patient about all relevant options for treatment, including options to which the physician morally objects.

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[1] Smith, S.D., *What does religion have to do with freedom of conscience?*, University of Colorado Law Review, 76, 911-940, 912.
[2] *Everson v. Board of Education*, 330 U.S. 1, 34 (1947).
[3] McConnell, M., *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).
[4] 745 Ill. Comp. Stat. 70/2
[5] 745 Ill. Comp. Stat. 70/3(e)
[6] Von Bergen, CW, and Bressler, M, *A matter of conscience: do conflicting beliefs and workplace demands constitute religious discrimination?*, Journal of Behavioral Studies in Business, 3, pgs. 113-126, 114 (April 2011).
[7] American Medical Association, *Code of Medical Ethics Opinion 1.1.7 – Physician Exercise of Conscience*, available at https://www.ama-assn.org/system/files/code-of-medical-ethics-chapter-1.pdf (last visited on May 10, 2023).
[8] Id.

- In general, physicians should refer a patient to another physician or institution to provide treatment the physician declines to offer. When a deeply held, well-considered personal belief leads a physician also to decline to refer, the physician should offer impartial guidance to patients about how to inform themselves regarding access to desired services.
- Continue to provide other ongoing care for the patient or formally terminate the patient-physician relationship in keeping with ethics guidance.

Some scholars argue that invoking personal conscience violates medical professional ethics.[9] And while courts will usually not compel health care providers to participate in procedures that violate their personal faith or conscience, they construe objections of associated "complicity" narrowly and thus may require such providers to give patients reasonable information about access to appropriate treatment.[10]

Conscience clauses are not without controversy. Several scholars question whether offering legal protections for health care providers' exercise of conscience is even justified.[11] Other commentators argue that conscience laws should not protect providers from criminal prosecution,[12] civil liability,[13] or regulatory sanction.[14]

Health Care Conscience Protection Laws

Conscience protection laws protect individuals and entities from being required to perform services that violate their religious beliefs or moral convictions. These statutes have historically related to abortion, sterilization, and contraception. Conscience protections apply to health care providers who refuse to perform, accommodate, or assist with certain health care services on religious or moral grounds. The inspiration for conscience protection laws may have come from the accommodation requirements in Title VIII civil rights laws; however, most conscience laws do not have the "reasonable" and "undue hardship" qualifiers for accommodating religious practices under that federal law.

Conscience protection 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".[15] Such laws protect conscientious objectors from coercive hiring or employment practices, discrimination and other forms of punishment or pressure. Also, these laws generally include civil liability protection. Federal statutes protect health care provider conscience rights and prohibit recipients of certain federal funds from discriminating against health care providers who refuse to participate in these services based on moral objections or religious beliefs.

Despite the level of interest in tracking legislative developments related to conscience laws in the U.S., there exists no empirical data on how frequently these various types of procedural protections arise.[16]

Federal Health Care Conscience Protections

Several federal health care provider conscience protection laws, detailed below, prohibit recipients of certain federal Department of Health and Human Services (HHS) financial assistance from discriminating against certain health care providers because of their refusal or unwillingness to

[9] Frader, J., Bosk, C.L., *The personal is political, the professional is not: conscientious objection to obtaining/providing/acting on genetic information*, Am J Med Genet C Semin Med Genet. 2009;151C(1):62-67.
[10] Lynch, H.F., *Conflicts of Conscience in Health Care: An Institutional Compromise*, Cambridge, MA, MIT Press, 2008: 231.
[11] Charo, R.A., *The Celestial Fire of Conscience – Refusing to Deliver Medical Care*, New England Journal of Medicine 352 (2005), pgs. 2471-2473, 2473.
[12] Nelson, L., *Provider Conscientious Refusal of Abortion, Obstetrical Emergencies, and Criminal Homicide Law*, American Journal of Bioethics, July;18(7): pgs. 43-50 (2018).
[13] Rich, B.A., *Your Morality, My Mortality: Conscientious Objection and the Standard of Care*, Cambridge Quarterly of Healthcare Ethics, 24: pgs. 214-230, 228 (2015).
[14] Id.
[15] White, K.A., *Crisis of conscience: Reconciling religious health care providers' beliefs and patient rights*, Stanford Law Review, 51, 1703-1749 (1999).
[16] Sawicki, N., *The Conscience Defense to Malpractice*, 108 Calif. L. Rev. 1255, pg. 1260 (2020).

participate in certain medical procedures, such as sterilization procedures and abortions, that are contrary to or consistent with the provider's religious beliefs or moral convictions. Providers protected under these federal laws include:[17]

- Individual physicians;
- Researchers;
- Nurses;
- Applicants for internships or residencies;
- Other health care professionals;
- Hospitals;
- Health insurance plans;
- Provider-sponsored organizations;
- Health maintenance organizations;
- Health care facilities; and
- Other health care entities.[18]

The following "covered entities" must comply with the federal health care provider conscience laws:[19]

- Federal agencies funded by appropriations to the U.S Departments of Health and Human Services (HHS), Labor, and Education;
- Qualified health plans offered through a health insurance exchange;
- Any entity receiving federal financial assistance under certain HHS-implemented statutes; and
- Any entity which receives an HHS grant or contract for biomedical or behavioral research.[20]

Under the federal health care provider conscience laws, covered entities may not, if it would be contrary to the individual's or health care entity's religious beliefs or moral convictions:[21]

- Require the individual to participate in sterilization or abortion;
- Require the entity to make its facilities available for sterilization or abortion;
- Require the entity to provide personnel to participate in sterilization or abortion;
- Discriminate against any physician or health care personnel in employment or staff privileges because the individual participated in or refused to participate in sterilization or abortion;
- Discriminate against any physician or health care personnel in employment or staff privileges because the individual participated in or refused to participate in any lawful health service or research activity;
- Deny admission to or otherwise discriminate against any training program applicant (including applicants for internships or residencies) because of the applicant's reluctance or willingness to participate in sterilization or abortion; or
- Discriminate against any individual or institutional health care entity that does not train in the performance of abortions or provide, pay for, provide coverage of, or refer for abortion.[22]

Also, covered entities must deem accredited any postgraduate physician training program that would be accredited, but for the reliance on an accrediting standard that (regardless of whether such standard provides exceptions or exemptions) requires an entity to perform abortions; or provide training for abortions.[23]

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[17] U.S. Department of Health and Human Services, Office for Civil Rights, *OCR Fact Sheet: Your Rights Under the Federal Health Care Provider Conscience Protection Laws*, available at https://www.hhs.gov/sites/default/files/ocr/civilrights/provider_conscience_factsheet.pdf. (last visited May 10, 2023).
[18] Id.
[19] Id.
[20] Id.
[21] Id.
[22] Id.
[23] Id.

HHS Office of Civil Rights

HHS Office for Civil Rights (OCR) enforces federal civil rights laws, conscience and religious freedom laws, the Health Insurance Portability and Accountability Act (HIPAA) Privacy, Security, and Breach Notification Rules, and the Patient Safety Act and Rule, which together protect your fundamental rights of nondiscrimination, conscience, religious freedom, and health information privacy. OCR protects rights by:

- Teaching health and social service workers about civil rights laws, conscience and religious freedom laws, health information privacy, and patient safety confidentiality laws.
- Educating communities about civil rights, conscience and religious freedom rights, and health information privacy rights.
- Investigating civil rights, conscience and religious freedom, health information privacy, and patient safety confidentiality complaints to identify discrimination or violation of the law and acting to correct problems.

A complaint under the Federal Health Care Provider Conscience Protection Statutes may be filed with the OCR if an individual believes he or she experienced discrimination because they:

- Objected to, participated in, or refused to participate in specific medical procedures, including abortion and sterilization, and related training and research activities.
- Were coerced into performing procedures that are against your religious or moral beliefs.
- Refused to provide health care items or services for the purpose of causing, or assisting in causing, the death of an individual, such as by assisted suicide or euthanasia.

OCR coordinates the handling of complaints with staff of the HHS programs from which the entity, with respect to whom a complaint has been filed, receives funding. If HHS becomes aware that a state or local government or an entity has conducted activities that may violate federal conscience protection laws, HHS will work with the offending government or entity to achieve voluntary compliance.[24] If voluntary compliance cannot be reached, HHS considers all legal options, including terminating funding and collecting fines paid out from violating the statutory conscience protections.[25]

OCR receives discrimination complaints under the following statutes:

- So-called Church Amendments;
- Coats-Snowe Amendment;
- Public Health Service Act S. 245;
- The Weldon Amendment;
- Patient Protection and Affordable Care Act (PPACA); and
- Medicaid and Medicare Advantage Conscience Provisions

The "Church Amendments"

The conscience provisions contained in 42 U.S.C. § 300a-7 et seq., collectively known as the "Church Amendments," were enacted in the 1970s to protect the conscience rights of individuals and entities that object to performing or assisting in the performance of abortion or sterilization procedures if doing so would be contrary to the provider's religious beliefs or moral convictions. The Church Amendments were also the first federal conscience provisions to be enacted and are the broadest in scope. This provision also extends protections to personnel decisions and prohibits any entity that receives a grant, contract, loan, or loan guarantee under certain Department-implemented statutes from discriminating

[24] U.S. Department of Health and Human Services, Office of the Secretary, Office for Civil Rights, *Enforcement of the Federal Health Care Provider Conscience Protection Laws*, slide 8 (June 9, 2016), available at https://www.hhs.gov/sites/default/files/ocr-provider-conscience-powerpoint-6-9-2016.pdf. (last visited May 10, 2023).
[25] Id.

against any physician or other health care personnel in employment because the individual either performed, or refused to perform an abortion if doing so would be contrary to the individual's religious beliefs or moral convictions. Specifically, the amendments contain the following major provisions:

- Prohibit courts and other public officials from requiring individuals or institutions receiving grants under certain federal programs to perform or assist in abortions or sterilizations or to provide facilities or personal for the same procedures;[26]
- Forbid discrimination against physicians or other health care providers because of their religious or moral objections to performing abortions or sterilizations;[27]
- Extend protection to individuals, including researchers and laboratory staff participating in HHS-funded behavioral or biomedical research;[28] and
- Bar any program funded by HHS from requiring any individual to perform or assist in "any part" of a "health service program or research activity" if such participation would be contrary to the individual's religious beliefs or moral convictions.[29]

The Coats-Snowe Amendment

In 1996, Congress passed the Omnibus Consolidated Rescissions and Appropriations Act of 1996. The Act addressed many issues, including funding for several federal agencies, prison litigation reform, and funding for the District of Columbia and reform of its schools. The Coats-Snowe Amendment was included in a general provision portion of the Act. The Amendment provides conscience protections for health care entities and individuals in connection with abortion training. The Amendment was enacted to address a new standard from the Accreditation Council for Graduate Medical Education (ACGME), which governs medical residencies, that required access to experience with induced abortion to be part of a resident's education, unless the resident had a moral or religious objection to such abortions.[30] Previously, training for abortions had been voluntary and not required for residency accreditation.

The Coats-Snowe Amendment prevents the federal government and any state or local government that receives any federal financial assistance from subjecting any "health care entity" to "discrimination" for refusing to train or arrange for training for induced abortions.[31] Such government units also may not discriminate against persons who attend a post-graduate training program that lacks abortion training.[32] The Amendment defines "health care entity" to "include an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions."[33] It does not define "discrimination."

The Coats-Snowe Amendment also addresses the accreditation of medical training programs. The federal government and any state or local government that receives federal funds must accredit a "health care entity" that, but for its refusal to provide abortion training, would be accredited.[34] As to this provision only, the Amendment expressly confers rulemaking authority. It provides that "[t]he government involved shall formulate such regulations . . . as are necessary to comply with this subsection."

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[26] 42 U.S.C. s. 300a-7(b)
[27] 42 U.S.C. s. 300a-7(c)(1); areas of prohibited discrimination include employment, promotion, termination, and extending staff privileges; the Church Amendments also prohibit discrimination against individuals because of their past involvement in lawful abortions or sterilizations.
[28] 42 U.S.C. s. 300a-7(c)(2); under this provision, no individual can be discriminated against on the basis that the individual performed or assisted in any lawful research activity or the individual refused to perform or assist in any research activity because it would be contrary to his or her religious beliefs or moral convictions.
[29] This provision covers a broad array of activities, including contraception programs and research activities administered by HHS.
[30] Accreditation Council for Graduate Medical Education, *1996-1997 Graduate Medical Education Directory 135* (1996), available at http://acgme.org/Portals/0/PDFs/1996-97.pdf. (last visited May 10, 2023).
[31] 42 U.S.C. s. 238n(a)(1)-(2)
[32] Id. at s. 238n(a)(3)
[33] Id. at s. 238n(c)(2)
[34] Id. at s. 238n(b)(1)

Public Health Service Act S. 245

Enacted in 1996, section 245 of the Public Health Service Act, contained in 42 U.S.C. § 238n, prohibits the federal government and any state or local government receiving federal financial assistance from discriminating against any health care entity on the basis that the entity:

- Refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions;[35]
- Refuses to arrange for such activities[36]; or
- Attends (or attended) a post-graduate physician training program, or any other program of training in the health professions, that does not (or did not) perform induced abortions or require, provide, or refer for training in the performance of induced abortions, or arrange for the training.

The Weldon Amendment

The Weldon Amendment was originally passed as part of the HHS appropriation and has been readopted or incorporated by reference in each subsequent HHS appropriations act since 2005. It provides that "none of the funds made available in this Act [making appropriations for the Departments of Labor, Health and Human Services, and Education] 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, provide coverage of, or refer for abortions." The Amendment covers a diverse group of health care entities, including physicians and other health care providers, hospitals, provider-sponsored organizations, HMOs, insurance plans and any kind of health care facility, organization or plan.

Patient Protection and Affordable Care Act (PPACA)

The PPACA (Pub. L. No. 111-148 as amended by Pub. L. No. 111-152) includes health care provider conscience protections within the health insurance exchange program. Section 1303(b)(4) of the Act provides that "No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions." An Executive Order from President Obama affirmed that under the PPACA, longstanding federal health care provider conscience laws remain intact, and new protections prohibit discrimination against health care facilities and health care providers based on their unwillingness to provide, pay for, provide coverage of, or refer for abortions.[37]

Additionally, section 1553 of the Affordable Care Act incudes conscience protections regarding assisted suicide:[38] "The Federal Government, and any State or local government or health care provider that receives Federal financial assistance under this Act (or under an amendment made by this Act) or any health plan created under this Act (or under an amendment made by this Act), may not subject an individual or institutional health care entity to discrimination on the basis that the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing."

Section 1303 provides that a State may choose to prohibit abortion coverage in its qualified health plans[39], and that such a plan is not required to provide abortion coverage as part of its "essential health

[35] 42 U.S.C. s. 238n(a)
[36] Id.
[37] The White House, President Barack Obama, Executive Order 13535, *Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act* (March 24, 2010).
[38] 42 USC s. 18113
[39] 42 U.S.C. s. 18023(a)(1)

benefits."[40] However, a qualified health plan that declines to provide abortion coverage must provide notice of this exclusion to potential enrollees.[41] And no qualified health plan may "discriminate" against any health care provider or facility because it refuses to provide, pay for, cover, or "refer for" abortions.[42] Section 1303 does not define "discriminate" or "refer for."

Congress recognized the potential conflict between section 1303 and other federal and state statutes, so the law states that nothing in the PPACA shall be construed to preempt or effect state laws on abortion, federal laws on abortion, specifically, those related to conscience protection, willingness or refusal to provide abortion, and discrimination based on that willingness or refusal,[43] or to relieve health care providers of their obligations to provide emergency services under federal or state laws, including the Emergency Medical Treatment and Labor Act.[44] Section 1303 also states that it does not "alter the rights and obligations of employees and employers" under Title VII.[45]

Section 1411 addresses exemptions to the PPACA's "individual responsibility requirement", known as the individual mandate.[46] Under this section, HHS may grant exemptions based on hardship, which HHS has stated includes an individual's inability to secure affordable coverage that does not provide for abortions,[47] membership in a particular religious organization, or membership in a health care sharing ministry.[48]

Medicaid and Medicare Advantage Conscience Provisions

In 1997, Congress passed the Balanced Budget Act of 1997, which included conscience provisions in various sections regarding Medicaid and Medicare. The statute prohibited Medicaid-managed organizations and Medicare Advantage plans from prohibiting or restricting a physician from informing a patient about his or her health and full range of treatment options.[49] But it also provided that Medicaid managed care organizations and Medicare Advantage plans are not required to provide, reimburse for, or cover a counseling or referral service if the organization or plan objects to the service on moral or religious grounds.[50] The organization or plan must, however, provide sufficient notice of their moral objections to prospective enrollees.[51] Neither the Medicaid nor Medicare Advantage provisions define "referral." The HHS Secretary does, however, have explicit rulemaking authority under the Social Security Act to implement these provisions.[52]

OCR Enforcement Activities

Some examples of OCR's enforcement activities include:

- OCR received complaints alleging Vanderbilt University violated the conscience rights of two nurse residency program applicants under the Church Amendments by requiring a written promise that the applicants would assist in pregnancy termination procedures.[53] OCR investigated and worked with Vanderbilt to resolve the complaints. In response, Vanderbilt agreed to:

[40] Id. at s. 18023(b)(1)(A)(i)
[41] Id. at s. 18023(b)(3)(A)
[42] Id. at s. 18023(b)(4)
[43] Id. at s. 18023(c)(2)(A)
[44] Id. at s. 18023(d)
[45] Id. at s. 18023(c)(3)
[46] 42 U.S.C. s. 18081(b)(5)(A)
[47] 84 Fed. Reg. at 23,172
[48] 42 U.S.C. s. 18081(5)
[49] 42 U.S.C. s. 1395w–22(j)(3)(A)(Medicare Advantage); 42 U.S.C. s. 1396u–2(b)(3)(A)(Medicaid).
[50] 42 U.S.C. s. 1395w–22(j)(3)(B)(Medicare Advantage); 42 U.S.C. s. 1396u–2(b)(3)(B)(Medicaid).
[51] 42 U.S.C. ss. 1395w–22(j)(3)(B)(ii) (Medicare Advantage); 42 U.S.C. s. 1396u–2(b)(3)(B)(ii) (Medicaid).
[52] 42 U.S.C. s. 1395w–26(b)(1) (Medicare Advantage).
[53] Supra, FN 13 at slide 21.

    - Inform nurse residency candidates that it does not require them to participate in pregnancy termination procedures, if it is inconsistent with their religious beliefs and moral convictions;
    - Remove to original acknowledgement form and replace it with information clarifying its accommodations for religious beliefs and moral convictions; and
    - Send revised information packets to new candidates, including the complainants.[54]
- OCR received complaints alleging Mt. Sinai Hospital forced a nurse to assist in performing an abortion, against her religious objections.[55] The complaint also alleged the hospital discriminated against the nurse by reducing the number of on-call shifts she received and asking her to sign a statement of her willingness to participate in abortions in emergencies, as a condition of getting assigned more on-call shifts, all of which violated the Church Amendments, Section 245 of the Public Health Service Act, and the Weldon Amendment.[56] Following an investigation by OCR, the hospital agreed to:
    - Use its best efforts to ensure that non-objecting health care personnel are available to perform abortions;
    - Issue and post a revised Human Resources Policy stating that: "The Mount Sinai Hospital does not discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel…, because he or she performed or assisted in the performance of a lawful sterilization procedure or abortion, or because he or she refused to perform or assist … [due to his or her] religious beliefs or moral convictions";
    - Comply with provisions of the Church Amendments; and
    - Train operating room managers, nurses and surgical technicians on the hospital's obligations to comply with the Church Amendments and train administrative staff to ensure that the operating room nurses' and surgical technicians'' objecting or non-objecting status is properly recorded.[57]

State Health Care Conscience Protections

While federal conscience protection laws generally deal with appropriations of federal funding, state laws protect against a broader range of penalties, including civil liability, criminal prosecution, loss of licensure, employment discrimination, discrimination in education, and denial of private or public funding.[58] Of these, civil liability immunity is by far the most common procedural protection.[59] In a majority of states, this immunity is absolute – providing no exceptions in the cases of malpractice, denial of emergency treatment, or patient death.[60]

Three states stand out as examples of broader conscience protections at the state level – Illinois, Mississippi, and Washington.

> *Illinois* – Any person, public or private institution, or public official may not discriminate against any other person in any manner because of that person's conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any particular health care service that violates his or her conscience.[61]

[54] Id. at slide 22.
[55] Id. at slide 23.
[56] Id.
[57] Id. at slide 24.
[58] Durham, R., *Neither Right nor Safe to Go Against It: Defending the Constitutionality of Conscience Laws*, University of Cincinnati Law Review (May 12, 2021), available at https://uclawreview.org/2021/05/12/neither-right-nor-safe-to-go-against-it-defending-the-constitutionality-of-conscience-laws/ (last visited on May 10, 2023).
[59] Supra, FN 8.
[60] Id.
[61] *745 Ill. Comp. Stat. Ann. 70/5* (2002).

Mississippi – Any person, health care provider, health care institution, public or private institution, or public official may not discriminate against any health care provider in any way because the provider declined to participate in a health care service that violates his or her conscience.

Washington – A health care provider, religiously sponsored health carrier, or health care facility may not be required to provide or pay for a health care service if they object to so doing for reason of conscience or religion. The law prohibits employment or professional privileges discrimination because of such objection.[62]

In addressing all health care services, the statutes in the preceding three states went well beyond the procedure-specific laws of other states at the time. It is also interesting to note the expansive meaning of "conscience" in each state – Illinois defines it as a "sincerely held set of moral convictions"; Mississippi includes "religious, moral, or ethical principles"; and Washington offers no definition at all.[63]

Following enactment of the Church Amendments, least 47 states and the District of Columbia passed conscience protection laws regarding the refusal to perform abortions.[64] Of these, at least 40 states offer protection from employment discrimination and/or recrimination.[65] The majority of U.S. jurisdictions (47 states) have conscience laws establishing a right on the part of individual and/or institutional health care providers to refuse to participate in abortion.[66] Fewer jurisdictions have laws relating to conscience-driven refusal to participate in sterilization (17 states), contraception (16 states), or emergency contraception (5 states).[67]

Of the forty-seven jurisdictions with abortion-specific conscience laws (forty-six of which protect rights of refusal),[68] thirty-seven explicitly establish immunity from civil liability for individual and/or institutional health care providers who refuse to participate in abortion. Thirty states protect providers from "disciplinary action." This term is often unspecified and undefined, though it is occasionally tied to specific adverse actors like employers. Twenty-six states protect providers from "discrimination," a similarly vague term. Another twenty-six states provide explicit protection against adverse actions by employers (for example, decisions relating to hiring, dismissal, demotion, transfer, wages, or staff privileges). Protection against adverse action by government actors, educational institutions, criminal prosecutors, state licensing boards, and funding sources was less common. Only four states establish a right to refuse but do not explicitly delineate any specific procedural protections.[69]

Each of the thirty-seven states that expressly established civil immunity for abortion refusal identified specific categories of providers entitled to such immunity. The most commonly protected groups were:

- "Any person" (twenty-six states),
- Health care facilities (twenty-six states),
- Physicians (seventeen states),
- Registered nurses (sixteen states), and
- Staff working at health care facilities (fourteen states).

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[62] *Wash. Rev. Code Ann. s. 70.47.160(2)(a)* (2002).
[63] Supra, FN 47 at pg. 275.
[64] Id.
[65] Id.
[66] Supra, FN 8 at pg. 1273-74.
[67] Id.
[68] Among the seventeen states with sterilization-specific conscience laws, fifteen provide for civil immunity. Civil liability protections were less common in laws relating to contraception and emergency contraception. Sixteen states have contraception-specific laws, but only five establish immunity from civil liability. Five states have laws relating to emergency contraception, but only one establishes immunity from civil liability.
[69] *Ariz. Rev. Stat. Ann. § 36-2154 (2020)*; *Conn. Agencies Regs. § 19-13-D54 (2005)*; *Tenn. Code Ann. §§ 39-15-204, 39-15-205 (2007)*; *W. Va. Code § 16-2F-7 (2020).*

Other categories of providers also singled out for civil immunity included:

- Private health care facilities (nine states),
- Health care providers (six states),
- Students (five states),
- Pharmacists (three states),
- Any licensed professionals (two states),
- Mental health professionals (two states),
- Public employees (two states), and
- Religious health care facilities (one state).[70]

Overall, all but two states protected extremely broad categories of individuals-either "persons" generally (not including health care professionals), health care providers, or staff and employees of health care facilities.[71] All but five states provided civil immunity to at least some health care facilities.[72] An additional five states limited institutional protections to private facilities[73], and one state protected facilities only if they were religiously affiliated.[74]

Although most states explicitly identify narrower categories of providers for civil immunity, almost every state protects a very broad range of individuals (thirty-five of thirty-seven states), and all or some health care facilities (thirty-two of thirty-seven states). Thus, in civil immunity states, most individuals and facilities are immune from suit if their unwillingness to participate in abortion falls below the standard of care and causes patient injury.[75]

In other reproductive health contexts, there are similar patterns. Of the seventeen states with conscience laws relating to sterilization, only four limit providers' refusal rights in any way.[76] Of the sixteen states with contraception laws, only six states limit providers' refusal rights or impose conditions to protect patients.[77] Of the five states with emergency contraception laws, three states limit providers' refusal rights.[78]

Among the forty-seven states with abortion refusal laws, only one state, Maryland, explicitly limits a provider's civil immunity where their conduct has violated the standard of care. However, Maryland's law does not provide patients with a remedy for all harms. Rather, it only applies in cases where the provider breaches a duty to give a referral and that breach causes the patient's "death or serious physical injury."[79]

Other states limit providers' conscience protections in situations where conscience-based refusals might seriously endanger patients. Thirteen states limit the right to refuse participation in abortion cases

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[70] Supra, FN 8 at pgs. 1276-77.
[71] The two outlier states did not extend their civil immunity provisions to any individual providers. *Nev. Rev. Stat. §449.191 (2019)*(protecting only private health facilities); *Or. Rev. Stat. § 435.475 (2019)*(protecting only hospitals).
[72] *Ga. Code Ann. § 16-12-142 (2013)*; *Iowa Code § 146.2 (2020)*; *Mass. Gen. Laws ch. 112, § 121 (2003); N.C. Gen. Stat. § 14-45-1 (2019)*.
[73] *Ky. Rev. Stat. Ann. § 311.800 (2020)*; *Nev. Rev. Stat. § 449.191*; *Okla. Stat. tit. 63 § 1-741* (2019); *S.C. Code Ann. § 44-41-40 (2019)*; *Wyo. Stat. Ann. §§ 35-6-105, 35-6-106 (2019)*.
[74] *Cal. Health & Safety Code § 123420(c)(2020)*(protecting "nonprofit hospital[s]" and "other facility[ies] or clinic[s] ... organized or operated by a religious corporation or other religious organization," and also persons, physicians, nurses, and facility staff)
[75] Among the fifteen states with sterilization-specific conscience laws that explicitly establish civil immunity, all protect at least one broad category of individual providers (persons, providers, or facility staff), and all but three protect health care facilities.
[76] *Ala. Code § 22-21B-4(b)(2019*; *745 Ill. Comp. Stat. 70/6 (2019)*; *Id. 70/6.1*; *Md. Code Ann., Health-Gen. § 20-214(d)(2020)*; *16 Pa. Code § 51.31(e)(2019)*; *Id. §§ 51.42(a), .43(a)*.
[77] *Cal. Code Regs. tit. 16, § 1746.1(b)(9)(2020)*; *Ga. Code Ann. § 49-7-6 (2001)*; *745 Ill. Comp. Stat. 70/6*; *Id. 70/6.1*; *N.Y. Comp. Codes R. & Regs. tit. 18 § 463.6(d) (2020)*; *Or. Rev. Stat. § 435.225 (2019)*; *Wis. Stat. Ann. § 253.075(3)(b)(2020)*.
[78] *Ariz. Rev. Stat. Ann. § 36-2154(B)(2020)*; *Cal. Code Regs. tit. 16, § 1746(b)(5)(2020)*; *Idaho Code § 18-611(4), (6) (2019)*.
[79] *Md. Code Ann., Health-Gen. § 20-214(d).*

where a patient requires emergency treatment.[80] A few states restrict the scope of abortion objections to exclude procedures intended to treat miscarriage (four states)[81] or ectopic pregnancy (three states)[82] conditions that can seriously threaten a pregnant patient's health.

Some states have also established patient-protective conditions on the exercise of providers' refusal rights. Eight states impose a duty to notify the patient of the refusal or of the hospital's general policy opposing abortion.[83] Two states require that providers who refuse to participate directly in abortions nevertheless ensure that the patient can access the service from another provider.[84] Two states require refusing providers to give the patient information regarding access to the requested service.[85] Two states require that a refusing provider return the patient's prescription.[86] Only one state imposes a statutory requirement that refusing providers satisfy the duty to secure a patient's informed consent, including the duty to inform patients of "legal treatment options" and the risks and benefits of these options."[87]

The following chart summarizes health care provider conscience protection laws in the states.[88]

State Policies Allowing Health Care Providers to Refuse to Provide Services Based on Conscience							
State	Abortion		Contraception			Sterilization	
	Provider	Institution	Provider	Pharmacist	Institution	Provider	Institution
Fed. Policy	X	X				X	X
Alabama	X	X					
Alaska	X	Private					
Arizona	X±	X±	X	X	X		
Arkansas	X	X	X	X	X	X	X
California	X	Religious					
Colorado			X	*	Private		
Connecticut	X						
Delaware	X	X					
D.C.							
Florida	X	X	X	*			
Georgia	X	X		X		X	X

[80] *Ala. Code § 22-21B-4(b)*; *Cal. Health & Safety Code § 123420(d) (2020)*; *Idaho Code § 18-611(4)*; *Id. § 18-611(6)*; *745 Ill. Comp. Stat. 70/6*; *Iowa Code § 146.1 (2020)*; *Ky. Rev. Stat. Ann. § 311.800(1)(2020)*; *La. Stat. Ann. § 40:1061.23(2020)*; *Id. § 40:1061.5*; *Md. Code Ann., Health-Gen. § 20-214(d)*; *Nev. Rev. Stat. § 632.475(3) (2019)*; *Okla. Stat. tit. 63, § 1-741(B)(2019)*; *Id. § 1-741(C)*; *Id. § 1-728c(1)*; *16 Pa. Code §§ 51.42(a), .43(a)*; *Id. § 51.43(b) (1977)*; *S.C. Code Ann. § 44-41-40 (2019)*; *Tex. Occ. Code Ann. § 103.004(2020)*.

[81] *Cal. Health & Safety Code § 123420(d)*; *La. Stat. Ann. § 40:1061.9(1)(b) (2020)*; *Okla. Stat. tit. 63, § 1-741(C)*; *16 Pa. Code § 51.43(b)*.

[82] *Ariz. Rev. Stat. Ann. § 36-2151(1) (2020)*; *La. Stat. Ann. § 40:1061.9(1)(c)*; *Utah Code Ann. § 76-7-301(1)(b)(ii)(2019)*.

[83] *Cal. Health & Safety Code § 123420(c)*; *745 Ill. Comp. Stat. 70/6.1 (2019)*; *La. Stat. Ann. § 40:1061.20(4) (2020)*; *Neb. Rev. Stat. § 28-337 (1977)*; *N.Y. Comp. Codes R. & Regs. tit. 10, § 405.9(b)(10)(2020)*; *Or. Rev. Stat. § 435.475(1)(2019)*; *16 Pa. Code § 51.31(e) (2019)*; *Wyo. Stat. Ann. § 35-6-105 (2019)*.

[84] *Ga. Code Ann. § 16-12-142(b) (2013)*; *745 Ill. Comp. Stat. 70/6.1*.

[85] *745 Ill. Comp. Stat. 70/6.1*; *N.Y. Comp. Codes R. & Regs. tit. 10, § 405.9(b)(10)* (establishing refusal rights and civil immunity for hospitals, "provided that the hospital ... shall inform the patient of appropriate resources for services or information").

[86] *Ariz. Rev. Stat. Ann. § 36-2154(B) (2020)* (requiring a refusing pharmacy, hospital, health professional, or employee to "return to the patient the patient's written prescription order"); *Ga. Code Ann. § 16-12-142(b)* (requiring a refusing pharmacist to "immediately return the prescription to the prescription holder").

[87] *45 Ill. Comp. Stat. 70/6 (2019)* ("Nothing in this Act shall relieve a physician from any duty, which may exist under any laws concerning current standards of medical practice or care, to inform his or her patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of treatment options, provided, however, that such physician shall be under no duty to perform, assist, counsel, suggest, recommend, refer or participate in any way in any form of medical practice or health care service that is contrary to his or her conscience.")

[88] Guttmacher Institute, *Policies Allowing Providers to Refuse*, available at https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services.

State Policies Allowing Health Care Providers to Refuse to Provide Services Based on Conscience							
State	Abortion		Contraception			Sterilization	
	Provider	Institution	Provider	Pharmacist	Institution	Provider	Institution
Hawaii	X	X					
Idaho	X	X	X	X		X	X
Illinois	X	X	X	*	X	X	X
Indiana	X	Private					
Iowa	X	Private					
Kansas	X	X	*+	*+		X	X
Kentucky	X	X				X	
Louisiana	X	X					
Maine	X	X	X	*	Private	X	X
Maryland	X	X				X	X
Massachusetts	X	Private			Private	X	Private
Michigan	X	X					
Minnesota	X	Private					
Mississippi	X	X	X	X	X	X	X
Missouri	X	X					
Montana	X	Private				X	Private
Nebraska	X	X					
Nevada	X	Private					
New Hampshire							
New Jersey	X	Private				X	Private
New Mexico	X	X					X
New York	X	X					
North Carolina	X	X					
North Dakota	X	X					
Ohio	X	X					
Oklahoma	X	X					
Oregon	X	Private					
Pennsylvania	X	Private					
Rhode Island	X					X	
South Carolina	X	Private					
South Dakota	X	X		X			
Tennessee	X	X	X	*	Private		
Texas	X	Private					
Utah	X	X					
Vermont							
Virginia	X	X					
Washington	X	X				X	X
West Virginia	X					X	X
Wisconsin	X	X				X	X
Wyoming	X	Private					
STATE TOTALS	47	44	9	6	8	17	16

(± In Arizona, private hospitals and health facilities may restrict the information that providers give to patients about lawful health care services if the institution's objection to providing the information is based on the sincerely held religious or moral beliefs)

(+ The law permits refusal if the provider "reasonably believes" the drug or device "may result" in an abortion)

(* Broadly worded refusal clause may apply. In Illinois, a state court held that a regulation requiring pharmacies to provide emergency contraception cannot be enforced against pharmacies that refuse to dispense the medication)

The next chart provides a snapshot of procedural protections in certain conscience laws,[89]

Procedural Protections for Providers in Certain Conscience Laws	
STATE	**Procedural Protections**
Alabama	Civil liability, Criminal prosecution, Discrimination, Education, Government action
Alaska	Civil liability
Arizona	None
Arkansas	Civil liability, Disciplinary action, Government action
California	Civil liability, Disciplinary action, Education, Employment action, Education
Colorado	N/A
Connecticut	None
Delaware	Civil liability, Disciplinary action
D.C.*	N/A
Florida	Civil liability, Disciplinary action
Georgia	Civil liability, Disciplinary action
Hawaii	Civil liability
Idaho	Civil liability, Criminal prosecution, Disciplinary action, Discrimination, Employment action, Government action
Illinois	Civil liability, Criminal prosecution, Disciplinary action, Discrimination, Education, Employment action, Funding, Government action, State licensure
Indiana	Disciplinary action, Discrimination, Education, Employment action
Iowa	Civil liability, Disciplinary action, Discrimination, Education, Employment action, Government action, State licensure
Kansas	Civil liability, Discrimination, Employment action
Kentucky	Civil liability, Disciplinary action, Discrimination, Education, Employment action, Funding, Government action, State licensure
Louisiana	Civil liability, Criminal prosecution, Disciplinary action, Discrimination, Education, Employment action, Government action
Maine	Civil liability, Disciplinary action, Discrimination, Education, Employment action, Government action
Maryland	Civil liability, Disciplinary action, Government action
Massachusetts	Civil liability, Disciplinary action, Discrimination, Education, Employment action, Funding, Government action
Michigan	Civil liability, Criminal prosecution, Disciplinary action, Discrimination, Employment action
Minnesota	Civil liability, Discrimination, Employment action
Mississippi*	N/A
Missouri	Civil liability, Discrimination, Education, Employment action, Funding, Government action
Montana	Civil liability, Disciplinary action, Discrimination, Employment action, Funding, Government action
Nebraska	Civil liability, Disciplinary action, Discrimination, Employment action
Nevada	Civil liability, Disciplinary action, Employment action
New Hamp.*	N/A
New Jersey	Civil liability, Criminal prosecution, Disciplinary action, Discrimination

[89] Supra, FN 8.

Procedural Protections for Providers in Certain Conscience Laws	
STATE	**Procedural Protections**
New Mexico	Disciplinary action
New York	Civil liability, Discrimination
North Carolina	Civil liability, Disciplinary action
North Dakota	Discrimination
Ohio	Civil liability, Disciplinary action
Oklahoma	Civil liability, Disciplinary action, Discrimination, Education, Employment action, State licensure
Oregon	Civil liability
Pennsylvania	Civil liability, Criminal prosecution, Disciplinary action, Discrimination, Education, Employment action, Funding, Government action, State licensure
Rhode Island	Civil liability, Disciplinary action
South Carolina	Civil liability, Disciplinary action, Discrimination, Employment action
South Dakota	Civil liability, Employment action, Government action
Tennessee	None
Texas	Discrimination, Education, Employment action
Utah	Civil liability, Disciplinary action, Discrimination, Employment action
Vermont**	Government action
Virginia	Civil liability, Disciplinary action, Employment action
Washington	Discrimination, Employment action
West Virginia	None
Wisconsin	Civil liability, Disciplinary action, Discrimination, Education, Employment action
Wyoming	Civil liability, Disciplinary action, Discrimination, Employment action

(* The state has no abortion conscience law)
(** The state has no abortion refusal law; protects participating providers only.)

Florida Conscience Protection Laws

Florida maintains three service-specific, statutory conscience protection laws:

- Section 381.0051(5), F.S., relating to family planning, allows a physician or other person to refuse to furnish any contraceptive or family planning service, supplies, or information for medical or religious reasons.
- Section 390.0111(8), F.S., relating to termination of pregnancies, permits any hospital or person to refuse to participate in an abortion, and protects an objector from any disciplinary or other recriminatory action as a result of the refusal.
- Section 483.918, F.S., relating to genetic counselors, permits a counselor to refuse to participate in counseling that conflicts with his or her deeply held moral or religious beliefs.

Free Speech of Health Care Practitioners

Licensure and Regulation of Physicians

The Division of Medical Quality Assurance (MQA), within the Department of Health (DOH), has general regulatory authority over health care practitioners.[90] The MQA works in conjunction with 22 boards and four councils to license and regulate seven types of health care facilities and more than 40 health care

[90] Pursuant to s. 456.001(4), F.S., health care practitioners are defined to include acupuncturists, physicians, physician assistants, chiropractors, podiatrists, naturopaths, dentists, dental hygienists, optometrists, nurses, nursing assistants, pharmacists, midwives, speech language pathologists, nursing home administrators, occupational therapists, respiratory therapists, dieticians, athletic trainers, orthotists, prosthetists, electrologists, massage therapists, clinical laboratory personnel, medical physicists, dispensers of optical devices or hearing aids, physical therapists, psychologists, social workers, counselors, and psychotherapists, among others.

professions.[91] Each profession is regulated by an individual practice act and by ch. 456, F.S., which provides general regulatory and licensure authority for the MQA. MQA is statutorily responsible for the following boards and professions established within the division:[92]

- The Board of Acupuncture, created under ch. 457, F.S.;
- The Board of Medicine, created under ch. 458, F.S.;
- The Board of Osteopathic Medicine, created under ch. 459, F.S.;
- The Board of Chiropractic Medicine, created under ch. 460, F.S.;
- The Board of Podiatric Medicine, created under ch. 461, F.S.;
- Naturopathy, as provided under ch. 462, F.S.;
- The Board of Optometry, created under ch. 463, F.S.;
- The Board of Nursing, created under part I of ch. 464, F.S.;
- Nursing assistants, as provided under part II of ch. 464, F.S.;
- The Board of Pharmacy, created under ch. 465, F.S.;
- The Board of Dentistry, created under ch. 466, F.S.;
- Midwifery, as provided under ch. 467, F.S.;
- The Board of Speech-Language Pathology and Audiology, created under part I of ch. 468, F.S.;
- The Board of Nursing Home Administrators, created under part II of ch. 468, F.S.;
- The Board of Occupational Therapy, created under part III of ch. 468, F.S.;
- Respiratory therapy, as provided under part V of ch. 468, F.S.;
- Dietetics and nutrition practice, as provided under part X of ch. 468, F.S.;
- The Board of Athletic Training, created under part XIII of ch. 468, F.S.;
- The Board of Orthotists and Prosthetists, created under part XIV of ch. 468, F.S.;
- Electrolysis, as provided under ch. 478, F.S.;
- The Board of Massage Therapy, created under ch. 480, F.S.;
- The Board of Clinical Laboratory Personnel, created under part III of ch. 483, F.S.;
- Medical physicists, as provided under part IV of ch. 483, F.S.;
- The Board of Opticianry, created under part I of ch. 484, F.S.;
- The Board of Hearing Aid Specialists, created under part II of ch. 484, F.S.;
- The Board of Physical Therapy Practice, created under ch. 486, F.S.;
- The Board of Psychology, created under ch. 490, F.S.;
- School psychologists, as provided under ch. 490, F.S.;
- The Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling, created under ch. 491, F.S.; and
- Emergency medical technicians and paramedics, as provided under part III of ch. 401, F.S.

Recognizing Agencies

DOH does not license health care practitioners by specialty or subspecialty based upon national board certification; however, ch. 459, F.S., prohibits osteopathic physicians from holding themselves out as board-certified specialists unless they have obtained that specialty from an approved recognizing agency.[93] Rule 64B15-14.001, F.A.C., relating to advertising, authorizes the Board of Osteopathic Medicine to approve recognizing agencies for purposes of certifying Florida-licensed osteopathic physicians as specialists in certain aspects of the practice of osteopathic medicine. The Board has approved the following 501(c) private, national organizations, as recognizing agencies:

- American Board of Medical Specialties
- American Osteopathic Association
- American Association of Physician Specialists, Inc.

[91] Florida Department of Health (DOH), Division of Medical Quality Assurance, *Annual Report and Long-Range Plan, Fiscal Year 2020-2021*, p. 6, https://mqawebteam.com/annualreports/2021/8/ (last visited May 10, 2023).
[92] S. 456.001(4), F.S; *Id*.
[93] S. 459.015, F.S. Similar provisions are contained within ch. 458 (allopathic physicians), ch. 464 (nurses) and ch. 466 (dentists).

- American Board of Interventional Pain Physicians

This rule establishes requirements for advertising by osteopathic physicians and does not confer upon the state any authority over the recognizing agencies.

Freedom of Speech

The First Amendment of the United States Constitution protects the right to freedom of expression from government interference. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.[94] "The First Amendment assures the broadest tolerable exercise of free speech, free press, and free assembly, not merely for religious purposes, but for political, economic, scientific, news, or informational ends as well."[95]

It is well established that a government regulation based on the content of speech is presumptively invalid and is upheld only if it is necessary to advance a compelling governmental interest, precisely tailored to serve that interest, and is the least restrictive means available for establishing that interest.[96] The government bears the burden of demonstrating the constitutionality of any such content-based regulation.[97] "Falsity alone may not suffice to bring the speech outside the First Amendment; the statement must be a knowing and reckless falsehood."[98]

Online Speech

The United States Supreme Court has clarified, "[o]nline speech is equally protected under the First Amendment as there is 'no basis for qualifying the level of First Amendment scrutiny that should be applied' to online speech."[99] This means that speech made on social media platforms is protected under the First Amendment, subject to any constitutional government regulations.

Under Florida law, "social media platform" means any information service, system, Internet search engine, or access software provider that:[100]

- Provides or enables computer access by multiple users to a computer server, including an Internet platform or a social media site;
- Operates as a sole proprietorship, partnership, limited liability company, corporation, association, or other legal entity;
- Does business in the state; and
- Satisfies at least one of the following thresholds:
    - Has annual gross revenues in excess of $100 million, as adjusted in January of each odd-numbered year to reflect any increase in the Consumer Price Index.
    - Has at least 100 million monthly individual platform participants globally.

[94] *See De Jonge v. Oregon*, 299 U.S. 353, 364–65(1937) (incorporating right of assembly); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating right of freedom of speech).
[95] Douglas v. City of Jeannette (Pennsylvania), 319 U.S. 157, 179, (1943) (Jackson, J., concurring in result).
[96] Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 665-66 (2004).
[97] *Id.* at 660.
[98] *See* U.S. v. Alvarez, 617 F. 3d 1198 (2012) and *New York Times v. Sullivan*, 376 U.S. 254 (1964).
[99] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997).
[100] S. 501.2041(1)(g), F.S. The term does not include any information service, system, Internet search engine, or access software provider operated by a company that owns and operates a theme park or entertainment complex as defined in s. 509.013.

Professional Speech

In 2018, the U.S. Supreme Court clarified that professional speech of individuals who perform personalized services that require a professional license from the state is not a separate category of speech exempt from the rule that content-based regulations of speech are practitioner to strict scrutiny.[101] Justice Thomas delivered the opinion of the court, stating "[t]he dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information."[102] Further, "[w]hen the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[103]

Currently, there are no disciplinary penalties established within any board, council, or DOH rule that specifically addresses a health care practitioner's "constitutional right to free speech." As such, there is no mechanism for establishing legal sufficiency to initiate an investigation, nor prosecuting a case for such an allegation.[104]

However, a health care practitioner may be disciplined for conduct that could be considered an exercise of free speech if such conduct is in violation of ch. 456, F.S., their practice act, or a rule of their board or the DOH, including, but not limited to, through the use of a social media platform, or prosecuted for violation of standard of care in a case in which the health care practitioner causes direct physical or psychological harm to a patient.

Free Speech Regulation – Department of Health

Current law authorizes a regulatory board or DOH, if there is no board, to discipline a health care practitioner's license for a number of offenses, including failing to adhere to the applicable standard of care and making misleading, deceptive, or fraudulent representations in or related to the practice of the licensee's profession.[105] DOH and the boards however, do not have the authority to regulate free speech. Per the DOH:[106]

> "There are no existing disciplinary penalties established within any board, council, or department rule that addresses a health care practitioner's "constitutional right to free speech." As such, there is no mechanism for establishing legal sufficiency to initiate an investigation, nor prosecuting a case for this allegation. Only in a case in which direct physical or psychological harm of a patient by a health care practitioner resulted could be prosecuted as a violation of standard of care."

Thus, DOH and the boards have not taken any adverse actions against a health care practitioner's licensed based solely on free speech.

Free Speech Regulation – Recognizing Agencies

Recognizing agencies are independent from the state and develop their own standards by which they certify and discipline health care practitioners. The state, including DOH and its regulatory boards, has no authority over the external credentialing of these private, national accrediting entities or their disciplinary practices.[107]

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[101] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2365 (2018).
[102] *Id.* at 2374.
[103] *Id.* at 2366.
[104] DOH, Agency Bill Analysis of 2022 HB 687, p. 4. (Feb. 4, 2022).
[105] S. 456.72, F.S.
[106] DOH, Agency Bill Analysis of 2022 HB 687, p. 4. (Feb. 4, 2022).
[107] DOH, Agency Bill Analysis of 2022 HB 687, p. 4. (Feb. 4, 2022).

Effect of Proposed Changes

Medical Conscience

CS/CS/HB 1403 establishes a health care provider[108] and health care payor right to decline to participate in any health care service, including treatment and research, that violates the sincerely held religious, moral or ethical beliefs of the provider or payor.

To act on this right, health care provider must provide verbal and written notification of the conscience-based objection to the patient and provider's employer or supervisor at the time when the incident giving rise to the objection occurs or as soon as practical thereafter. A health care provider must also document the objection in the patient's medical record. Similarly, students must provide written notification to their educational institution at the time when the incident giving rise to the objection occurs or as soon as practical thereafter. The bill is silent as to how health care payors must raise a conscience-based objection.

The bill requires a health care provider to notify a patient prior to scheduling an appointment if the patient seeks a health care service that the practitioner does not provide based on a conscience-based objection. The bill also expressly states that a health care provider or payor may not opt out of providing care based on a patient's race, color, religion, sex, or national origin.

The bill prohibits any person, governmental entity, business entity and educational institution from discriminating against a health care provider or payor on the basis of conscience-based objection. The bill prohibits a health care payor from denying payment based upon a conscience-based objection for a service it is obligated to cover during a plan year.

The bill provides civil immunity to health care providers and health care payors exercising their right of conscience and provides whistleblower protections. The bill also authorizes the Attorney General to bring a civil action for damages, injunctive relief, or any other appropriate relief for any actual or threatened adverse action due to declining to participate in a health care service that violates the provider's or payor's conscience if a health care practitioner files a complaint with the Attorney General.

The bill does not waive or modify any duties that a health care provider or payor has to provide or pay for health care services that are unrelated to a service that has been objected to on conscience grounds. Additionally, the bill states that medical conscience objections do not override the requirements of the federal Emergency Medical Treatment and Active Labor Act (EMTALA).[109]

Free Speech by Health Care Practitioners

The bill prohibits a board within the jurisdiction of DOH, or DOH if there is no board, from taking disciplinary action against a health care practitioner solely for exercising the constitutional right of free speech, including, but not limited to, speech via social media.

The bill authorizes a board within the jurisdiction of DOH to revoke approval of specialty boards and recognizing agencies if these entities revoke a practitioner's certification based solely upon the

[108] The bill's definition of health care provider includes all Florida licensed health care practitioners and facilities.

[109] EMTALA requires hospitals and emergency departments to provide medical screening examinations and to stabilize any patient with an emergency medical condition. 42 U.S. Code § 1395dd.

practitioner exercising the constitutional right of free speech. Current law does not authorize DOH or the boards to approve recognizing agencies. Neither the Board of Medicine nor DOH have "approved" recognizing agencies in any way. The only context in which "recognizing agencies" have been "approved" relates to osteopathic physician advertising. Thus, under current rules only the following boards could have their status as recognizing agencies revoked under the bill's provisions:[110]

- American Board of Medical Specialties
- American Osteopathic Association
- American Association of Physician Specialists, Inc.
- American Board of Interventional Pain Physicians

The only apparent impact of such a revocation is that Florida osteopathic physicians could not hold themselves out as specialists.[111] It is unclear whether revocation of this approval would have any other impact. These recognizing agencies, as well as other specialty boards, are national in scope. They choose to develop their own standards by which they certify health care practitioners as specialists. While the State of Florida may prohibit persons from holding themselves out to be certified specialists in aspects of the practice of osteopathic medicine, the state does not have the ability to prohibit these recognizing agencies from taking adverse actions against the certification of persons who fail to meet the recognizing agency's or specialty board's standards. Florida has no control over the certification and disciplinary processes created by these independent organizations and might not be able to enforce the provisions of the bill.

The bill also provides a severability clause applicable to all provisions of the bill.

The bill provides an effective date of July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

[110] Rule 64B15-14.001, F.A.C.
[111] Id.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.