

Courts Vacate Conscience Rules & Religious Protections

by Mark E. Chopko and Jennifer A. Gniady

A New York federal judge vacated in full the conscience rules (<https://www.scribd.com/document/433796533/State-of-New-York-v-HHS>) by the U.S. Department of Health and Human Services (HHS) in May, which put in place a broad framework of protections for the religious beliefs and moral objections of health care workers. In vacating the conscience rules, U.S. District Judge Paul Engelmayer took the administration to task for the rule's "glaring legal defects," which were picked apart throughout an opinion that ran to 147 pages. In short, the court found the substantive changes to the previously existing conscience protections exceeded the authority of HHS in many, though not all, instances; constituted arbitrary and capricious actions by the agency; and were barred by the U.S. Constitution's spending clause. What "shards of the rule" remained following the court's decision were deemed insufficient to be allowed to go forward. On the heels of the decision, Judge Stanley Bastian in the U.S. District Court for the Eastern District of Washington issued an oral ruling against the conscience protections the following day. The Washington ruling largely echoed the Engelmayer decision but said a written decision to come later would focus on issues not addressed by the New York court.

The rules, published in early May, which we discussed in more depth here (<https://www.stradley.com/insights/publications/2019/05/client-alert-nonprofit-and-health-law-may-2019>), had explicitly extended protections to individual health professionals, hospitals, laboratories, research programs, pharmacies and health insurance issuers, among others, to permit anyone with a "specific, reasonable, and articulable connection" to raise a religious objection to performing or "assisting in the performance" of a procedure. Compliance with the rule would have been required for approval and renewal of federal funding and required federal fund recipients to keep documentation of relevant policies, procedures and accommodation requests for three years. Penalties could be imposed simultaneously with investigations and included a full loss of federal funding for violations.

This decision comes just over two weeks before the rules were slated to go into effect after being pushed back from the original July enforcement date due to the pending litigation. Still pending, as of this alert, are decisions in two similar cases brought by the state of California and the city and the county of San Francisco. Little response is expected from the Justice Department until those decisions are handed down and more complete analysis of potential appeals is conducted.

The key holdings of the case included:

- The substantive revisions under the new rule exceeded the rulemaking authority of HHS under the Church, Coats-Snow and Weldon amendments by adding definitions and certification requirements to the existing conscience protections of those amendments.
- Although substantive revisions were supported under other existing conscience protections connected to Medicare, Medicaid and the Affordable Care Act, those permitted changes were too few and disjointed to be severed from the invalid portions of the rule.

Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103-7018
215.564.8000 Telephone
215.564.8120 Facsimile
www.stradley.com

With other offices in:
Washington, D.C.
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- HHS lacked delegated authority to implement a penalty for noncompliance that authorized the termination of all of the recipient’s HHS funds violated the Administrative Procedure Act (APA).
- The new conscience provisions were contrary to law based on conflicts with the existing Title VII framework for employee accommodations and the effect on emergency situations governed by the Emergency Medical Treatment and Active Labor Act (EMTALA).
- HHS acted arbitrarily and capriciously where its stated reasons for the rule changes were not supported by the record, were inadequately explained prior to the change and included only conclusory analysis of the effects of the rule.
- The new definitions of “discriminate or discrimination” went beyond any “logical outgrowth” of the proposed rulemaking notice, violating the APA.
- The rule imposed significant retroactive conditions that jeopardized overwhelming reliance on federal funds in a way that could not have been anticipated, creating a violation of the spending clause.
- There was no facial establishment clause violation where the rule recognized both secular moral and religious objections on an equal basis.

Only this week, the administration also published a notice of proposed rulemaking (<https://www.hhs.gov/sites/default/files/hhs-grants-regulation-nprm.pdf>) undertaking to examine and reissue rules to provide greater protection to faith-based social



Mark E. Chopko



Jennifer A. Gniady

For more information, contact Mark E. Chopko at 202.419.8410 or mchopko@stradley.com or Jennifer A. Gniady at 202.419.8436 or jgniady@stradley.com.

service providers, such as foster and adoption agencies. That proposal would change a 2016 regulation that has been used to limit the work of faith-based providers by requiring them to engage in practices that violate their religious beliefs. Litigation on the issue of restricting religious organizations in this area is ongoing in Michigan, New York and Pennsylvania and is targeted by the proposed rule change. However, it is too early to say whether the rulemaking process in this case will avoid the broad legal defects found by the New York court in the general conscience clause protections.

We will continue to provide updates on the cases in California and further developments on conscience and religious protections in health care. In the meantime, little has changed about the many challenges to finding common ground that balances protections in both the anti-discrimination and religious freedom areas. And given an upcoming election in an already difficult political climate, health care providers need to remain attentive to these issues.