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HHS Issues Notice of Violation to California for its Universal Abortion Coverage Mandate

On Friday afternoon, January 24, 2020, the U.S. Department of Health and Human Services (HHS), Office for Civil Rights (OCR) issued a Notice of Violation to the state of California demanding that the state stop imposing abortion coverage mandates on health plans and issuers, (“**Notice**”). The Notice gives California 30 days to inform OCR whether it will take corrective action or continue imposing the coverage mandates. The Notice warns that if California chooses to continue imposing the coverage mandates, OCR will forward the Notice and its evidence to the “appropriate HHS funding components” for further action.

The mandates to which the Notice of Violation refer are letters the California Department of Managed Health Care (DMHC) sent to seven California health care service plan issuers¹ in August of 2014 (the “Mandate Letters”). The Mandate Letters declared that limiting or excluding coverage of abortion is inconsistent with California’s Knox-Keene Act, which governs managed care plans, and the California Constitution. The Mandate Letters instructed each health plan to amend its plan documents to remove any such coverage exclusions and limitations.

Thereafter, a Catholic order of religious women, Missionary Guadalupanas of the Holy Spirit, Inc. (“Missionary Guadalupanas”) filed a complaint alleging that the Mandate Letters violated the Administrative Procedures Act (“APA”). *Missionary Guadalupanas of Holy Spirit Inc. v. Rouillard*, 38 Cal. App. 5th 421 (2019), review denied (Nov. 20, 2019).² The court found that the APA did not apply because the law the DMHC applied in issuing the Mandate Letters was not ambiguous, stating that “abortion services are unambiguously included in the statutory categories of ‘basic health care services’ set forth in [California Health and Safety Code section 1345].” *Id.* at 427-28.

Before the court decision was issued, Missionary Guadalupanas and other entities submitted complaints to OCR alleging, among other things, that the Mandate Letters burdened their conscience rights by compelling them to fund, through their premium payments, the practice of abortion on demand



for other plan participants. OCR did not directly address religious employers' conscience rights, but instead invoked the Weldon Amendment.³ The Weldon Amendment, states, in relevant part: "None of the funds made available in this Act may be made available to a...State or local government, if such...government subjects any institution 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."⁴ The Weldon Amendment does not apply to religious employers like those who complained to OCR; it protects "institutional or individual health care entit[ies]" including health care professionals, hospitals, provider-sponsored organizations, health maintenance organizations, health insurance plans, and "any other kind of health care facility, organization, or plan."⁵

Before the Notice was issued, the DMHC argued that it did not discriminate against health plans because the health plans that received the Mandate Letters already covered the legally required abortion services for the vast majority of their enrollees.⁶ OCR disagreed, asserting that the discriminatory act was telling health plans in the Mandate Letters that they either had to "amend and refile license documents in violation of health care entities' rights under the Weldon Amendment, or operate without approved plans and face possible enforcement action for being in violation of California law."⁷ OCR concluded that "[t]his action discriminated against plans on the basis that they did not cover all abortions, notwithstanding the fact that DMHC had, for many years, consistently approved plan language limiting abortion coverage."⁸ Indeed, the Mandate Letters stated that a "religiously sponsored health carrier" may not be required by law "to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion."⁹

OCR, however, found that exempting only "religiously sponsored" health plans also violated the Weldon Amendment. OCR interpreted the Weldon Amendment to protect all plans that decline to cover abortion, not just issuers, sponsors, or beneficiaries that have a religious character or reason for not providing or paying for such coverage.¹⁰ OCR also found that in order for California's regime to be compliant with the Weldon Amendment, exemptions from the abortion mandate may not be discretionary (as was an exemption DMHC granted to Anthem Blue Cross), but rather must be available to all health care entities.¹¹

OCR's determination appears to differ from conclusions the agency released in 2014. In 2014, the Alliance Defending Freedom and the Life Legal Defense Foundation filed complaints with OCR in 2014 on behalf of a handful of California churches and Loyola Marymount University workers following the Mandate Letters. The complaints alleged a violation of the Weldon Amendment. The OCR then, however, noted that none of the seven insurers had religious or moral objections to expanding coverage of elective abortions, and that the groups that filed the complaint would not be considered "health care entities" under the Weldon Amendment.

The Notice does not specify how much it may withhold if California refuses to comply within the 30 days, or from what specific funds. However, OCR's focus on the DMHC indicates the starting point will be Medi-Cal managed care funding—the DMHC regulates commercial and government managed care plans, including Medicaid (Medi-Cal), which receives the majority of federal funds. More than \$7 of every \$10 California receives from the federal government go to child welfare services, foster care, the CalWORKs welfare-to-work program, other programs that assist low-income and vulnerable Californians, and Medi-Cal beneficiaries, which include children, seniors, and other low-income Californians.¹² Approximately 84% of this funding, which was \$58 billion of \$69.3 billion in 2016-17, goes to Medi-Cal. Thus, withholding funding will necessarily lower Medi-Cal reimbursement even further.

The current funding for Medi-Cal is already so low that it does not cover providers' costs. Greater shortfalls could lead to providers refusing to accept Medi-Cal patients, cutting costs and expenditures for quality care and important capital improvements, and charging commercial plans more to cover increased losses, leading to higher premiums and health care costs. Thus, cutting Medi-Cal funding will mean harm to providers and all Californians.



Trump health officials said their announcement serves as warning to other states with similar requirements.¹³ “Once again, President Trump’s administration is delivering on his promise to protect human life and all Americans’ freedom of conscience,” said HHS Secretary Alex Azar. Despite that OCR’s decision under the Weldon Act is necessarily limited to institutions and health care entities, not individuals or employers, Azar stated: “Under President Trump, HHS has been vigorously enforcing the statutes Congress passed to protect Americans’ consciences and institutionalizing these protections within the department’s civil rights work.” Roger Severino, Director of OCR joined in, stating: “No one in America should be forced to pay for or cover other people’s abortions. We are putting California on notice that it must stop forcing people of good will to subsidize the taking of human life, not only because it’s the moral thing to do, but because it’s the law.”

In response to the Notice, California Gov. Gavin Newsom (D) said in a statement, “California will continue to protect a woman’s right to choose, and we won’t back down from defending reproductive freedom for everybody — full stop.”¹⁴ California Attorney General Xavier Becerra (D) also said on Twitter that California would defend the law. “The President & VP are once again attacking women’s health in order to grandstand at today’s anti-choice rally,” Becerra wrote. He added: “While it’s unfortunate that the President’s moral compass always points to sowing division for cheap political gain, California won’t be deterred.”

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¹ Aetna Health of California, Inc., Blue Cross of California (dba Anthem Blue Cross), California Physicians’ Service (dba Blue Shield of California), Health Net of California, Inc., Kaiser Foundation Health Plan, GEMCare Health Plan, Inc., and UnitedHealthcare of California.

² Notice, p. 5.

³ The “Weldon Amendment” was enacted in 2004, and since then has been readopted yearly through various Appropriations Acts. See, e.g., Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, § 507(d), 132 Stat. 348, 764 (Mar. 23, 2018). OCR asserts it has jurisdiction to take action against California under the Weldon Amendment. Notice, p. 6.

⁴ E.g., 2020 Weldon Amendment, § 507(d)(1), 133 Stat. at 2607.

⁵ E.g., 2020 Weldon Amendment, § 507(d)(1) & (2) 133 Stat. at 2607

⁶ Notice, p. 13.

⁷ Notice, p. 9.

⁸ *Id.*

⁹ Notice, p. 11.

¹⁰ Notice, p. 12.



¹¹ *Id.*
¹² Scott Graves, Federal Funds Comprise Over One-Third of California's State Budget, Supporting a Broad Range of Public Services and Systems (Dec. 2016), California Budget & Policy Center, *available at* <https://calbudgetcenter.org/resources/federal-funds-comprise-one-third-californias-state-budget-supporting-broad-range-public-services-systems/>
¹³ *Id.*
¹⁴ William Wan, Trump administration threatens funds to California over requirement that health plans cover abortion (Jan. 24, 2020), The Washington Post, *available at* <https://www.washingtonpost.com/health/2020/01/24/trump-administration-threatens-funds-california-over-its-requirement-that-health-plans-cover-abortion/>