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## California Medicaid Set to Lose \$200 Million in Funding Next Quarter for its Universal Abortion Coverage Mandate

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On December 16, 2020, the U.S. Department of Health and Human Services (HHS), Office for Civil Rights (OCR), announced that the Centers for Medicare & Medicaid (CMS) will disallow \$200 million in federal Medi-Cal funding next quarter due to California's refusal to stop imposing abortion coverage mandates on health plans and issuers. Each quarter CMS will disallow another \$200 million in Medicaid Federal Financial Participation funds until California abandons its abortion coverage mandate. HHS states that its enforcement action is consistent with legal precedent regarding the federal government's authority to impose conditions on funds.

King & Spalding issued a [Client Alert](#) in January, 2020, after HHS first issued a notice of violation (the "Notice") to California warning California that if it continued to impose the abortion coverage mandate, OCR would pursue enforcement measures including potentially withholding Medi-Cal funding. Almost a year later, OCR has made good on its promise. The penalty stems from letters the California Department of Managed Health Care (DMHC) sent in August 2014 to seven California health care service plan issuers ("Letters").<sup>1</sup> The Letters stated that limiting or excluding abortion coverage is contrary to the tenets of the California Constitution and the Knox-Keene Act, the statute governing managed care plans.<sup>2</sup> The California Constitution does not allow health plans to discriminate against women who choose to have an abortion and the Knox-Keene Act requires health plans to provide basic healthcare services. Based on these laws and several California judicial decisions, the Letters instructed the health plans to review all plan documents to make sure that they were compliant with California law regarding legal abortions and to remove any language that limited or restricted coverage for legal abortions.

After the DMHC sent the Letters, Missionary Guadalupanas and other entities filed complaints with OCR alleging that their religious conscience rights were burdened by having to fund abortions through their premium



payments. OCR concluded that the Letters violated the Weldon Amendment, a federal antidiscrimination law, even though the Weldon Amendment applies to “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” - not religious employers like the ones who submitted the complaints to OCR.<sup>3</sup> OCR stated in the Notice that the Letters discriminated against health plans that did not cover legal abortions, even though, DMHC had permitted exemptions for health plans in the past.<sup>4</sup>

Historically, OCR had taken the opposite position, i.e., that the Weldon Amendment did not apply to religious employers because they were not “health care entities.” Indeed, in the past, “OCR called into question its ability to enforce the Weldon Amendment against a State at all because . . . to do so could ‘potentially’ require the revocation of Federal funds to California in such a magnitude as to violate State sovereignty and constitute a violation of the Constitution.”<sup>5</sup> Representative Weldon the sponsor of the Weldon Amendment also stated, “[T]he provision only affects instances when a government requires that a **health care entity** provide abortion services. Therefore, . . . this provision will not affect access to abortion, the provision of abortion-related information or services by willing providers or the ability of States to fulfill Federal Medicaid legislation.”<sup>6</sup>

Whether or not the OCR can enforce California’s compliance by withholding Medicaid funding is unclear. In May 2019, OCR issued a final rule concerning its authority to protect statutory conscience rights in health care and added withholding federal funds, in whole or in part, as one component of its enforcement authority.<sup>7</sup> Several lawsuits were filed challenging the rule and in November 2019, Judge Engelmayer, a federal district court judge in the Southern District Court in California, vacated the rule in its entirety on a nationwide basis.<sup>8</sup> Of note, the Judge found that the rule would dramatically expand the OCR’s enforcement tools and penalties including terminating all HHS funding and terminating HHS funding immediately before imposing additional conditions on the recipient.<sup>9</sup> The court held the broadened enforcement measures would violate the Spending Clause of the U.S. Constitution because the rule conditioned all HHS funding on compliance with the rule.<sup>10</sup>

The court did not reach the question of whether withholding a portion of Medicaid funding would be improper. However, the court stated that HHS’s enforcement authority was limited to the UAR and that the “UAR does not put in jeopardy Medicare or Medicaid reimbursements.”<sup>11</sup> Instead, the UAR limits HHS enforcement to terminating, in whole or in part, grants, cooperative agreements, loan guarantees, and non-cash contributions or donations of property not Medicaid reimbursement.<sup>12</sup> The UAR only permits termination of an entity’s “federal award,” which is defined as “Federal financial assistance,” in instances of noncompliance and “Federal financial assistance” does not include Medicaid reimbursement.<sup>13</sup>

Furthermore, it does not appear that HHS has authority pursuant to the Weldon Amendment to withhold California’s Medicaid funding. The Weldon Amendment is “silent as to remedy” and HHS has recognized that the Weldon Amendment does not grant HHS rulemaking authority.<sup>14</sup> Without a statutory or regulatory basis to withhold California’s Medicaid funding, OCR is testing the outer limits of its enforcement authority.

Trump health officials stated that its enforcement measures should serve as a warning to other entities. Roger Severino, OCR Director said, “Entities that receive HHS funds should think twice before flouting federal law and refusing to come into compliance. As a result of our actions today, California will be losing \$200 million in federal funds per quarter . . .” Severino also stated, “Whatever one thinks of the legality of abortion, no one should be punished for declining to pay for or assist in the taking of human life.”



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<sup>1</sup> 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.

<sup>2</sup> DMHC, Director's Letters and Opinions, available at <https://www.dmhc.ca.gov/aboutthedmhc/lawsregulations/directorslettersandopinions.aspx>.

<sup>3</sup> Notice, p. 9.

<sup>4</sup> Notice, p. 12.

<sup>5</sup> 84 FR 23170, 23179 (May 21, 2019).

<sup>6</sup> 150 Cong. Rec. H10,090 (Nov. 20, 2004) (emphasis added).

<sup>7</sup> 45 C.F.R. § 88.7(i)(3).

<sup>8</sup> *New York v. United States Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475, 497 (S.D.N.Y. 2019).

<sup>9</sup> *Id.* at 515.

<sup>10</sup> *Id.* at 569-72.

<sup>11</sup> *Id.* at 532.

<sup>12</sup> 45 C.F.R. § 75.371(c).

<sup>13</sup> *Id.*

<sup>14</sup> *New York v. United States Dep't of Health & Human Servs.*, 414 F. Supp. 3d at 533.