ACLJ

MEMORANDUM

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Conscience Rights of Health Care Personnel

As founding father, James Madison, once wrote, "conscience is the most sacred of all property."[1] Conscience rights are not only important to the health care community but to every American. In *Cantwell v. Connecticut*, the Supreme Court stated, "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law." When it comes to the conscience rights of health care personnel, numerous state and federal laws have been enacted to ensure these individuals' conscience rights are not violated. The three main federal conscience laws that will be discussed below are the Church Amendment, the Coats-Snowe Amendment, and the Weldon Amendment. The discussion below will also analyze Title VII of the Civil Rights Act of 1964 and the right this law gives to health care providers, as well as the Religious Freedom Restoration Act.

The Church Amendment

Following the controversial ruling in *Roe v. Wade*, a federal district court wrongfully forced a religiously affiliated hospital to use its facilities for a sterilization procedure.[2] In response to *Taylor v. St. Vincent's Hospital*, the growing need to protect the conscience rights of health care workers and entities was addressed when Congress passed the "Church Amendment" in 1973 (Senator Frank Church was the principal sponsor of the law).[3] Essentially, the statute protects the conscience rights of health care personnel working at entities that receive funds and grants from the U.S. Department of Health and Human Services. The law provides in relevant part:

> *Discrimination prohibition*
> *No entity which receives a grant, contract, loan, or loan guarantee under the Public Health Service Act [42 U.S.C. 201 et seq.], the Community Mental Health Centers Act [42 U.S.C. 2689 et seq.], or the Developmental Disabilities Services and Facilities Construction Act [42 U.S.C. 6000 et seq.] after June 18, 1973, may—*
>
> *(A) discriminate in the employment, promotion, or termination of employment of any*

[1] James Madison, *Property* (1792), in 1 *The Founders' Constitution* 598, 598 (Philip B. Kurland and Ralph Lerner eds., 1986).
[2] See *Taylor v. St. Vincent's Hospital*, 369 F. Supp. 948 (D. Mont. 1973).
[3] 42 U.S.C. § 300a-7.

physician or other health care personnel, or
(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.[4]

The Coats-Snowe Amendment (42 U.S.C. § 238n)

In response to medical students feeling coerced into learning how to perform abortions, Congress passed the Coats-Snowe Amendment in 1996.[5] The Coats-Snowe Amendment is divided into three sections. In sum, the law prohibits federal and state governments from compelling or coercing participation in abortion training.[6] Additionally, such training cannot be a condition of any accreditation or licensure. The key language of the statute is provides as follows:

(a) In general. *The Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity to discrimination on the basis that—*
(1) *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;*
(2) *the entity refuses to make arrangements for any of the activities specified in paragraph (1); or*
(3) *the entity 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 make arrangements for the provision of such training.*
(b) Accreditation of postgraduate physician training programs.
(1) *In general. In determining whether to grant a legal status to a health care entity (including a license or certificate), or to provide such entity with financial assistance, services or other benefits, the Federal Government, or any State or local government that receives Federal financial assistance, shall deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standards [standard] that requires an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training, regardless of whether such standard provides exceptions or exemptions. The government involved shall formulate such regulations or other mechanisms, or enter into such agreements with accrediting agencies, as are necessary to comply with this subsection.*[7]

It is important to note that "health care entity" is defined by the Amendment as including an "individual physician, a postgraduate physician training program, and a participant in a program of

[4] *Id.*
[5] *City & Cnty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1006 (N.D. Cal. 2019).
[6] 42 U.S.C. 238n.
[7] *Id*.

training in the health professions."[8]

Weldon Amendment

Similar to the Coats-Snowe Amendment, the Weldon Amendment protects against governmental coercion in the context of abortion. However, the Weldon Amendment sweeps more broadly across the medical field. The Weldon Amendment cuts federal funding from federal and state government entities if those entities discriminate against health care entities on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.[9] Specifically, the federal funds referenced here are appropriated funds. Where the Weldon Amendment sweeps broader than the Coats-Snowe Amendment is in the definition of "health care entity." In the Weldon Amendment a health care entity is defined as, "individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan."[10] This law is a vital layer in the protection of health care conscience rights. Virtually, all health care workers are protected from state criminal prosecution or loss of their medical license.[11]

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 serves as a protection for religious rights in the workplace by making it illegal for an employer to discriminate against employees or prospective employees based on his/her religion. The law states in pertinent part:

> *(a) Employer Practices*
>
> *It shall be an unlawful employment practice for an employer-*
>
> *(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's… religion; or*
>
> *(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's…religion.*
>
> *For the purposes of this subchapter-*
>
> *(j) The term "religion includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.*

The Supreme Court has held that any accommodation requiring the employer to bear "more than a de minimis cost," or, in other words, "additional costs when no such costs are incurred," constitutes an "undue hardship." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977). This includes any accommodation that results in additional costs in the "form of lost efficiency… or higher wages." *Id.* at 84. Importantly, the

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[8] *Id*.
[9] 84 F.R. 23170, 23172.
[10] Weldon Amendment, Consolidated Appropriations Act, 2009, Pub. L. No. 111-117, 123 Stat 3034.
[11] *State ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006).

United States Court of Appeals for the Ninth Circuit, pursuant to the decision in *Hardison*, has held that "the circumstances under which a particular accommodation may cause 'undue hardship' must be made in the *particular factual context of each case*."

In *Hardison,* the Supreme Court held that the employer was not required to break its system of seniority used to determine employees' schedules in order to accommodate Larry Hardison, an employee who refused to work on the Sabbath due to his faith. *Id*. The Court held that breaking the seniority system by moving a supervisor from another department or requiring an employee with more seniority to change his/her days off in order to accommodate Hardison would place an "undue hardship" on the employer *and* other employees. *Id.* As a result, TWA was not required to grant Hardison a religious accommodation. *Id.* at 85. More recently, however, the United States Court of Appeals for the Ninth Circuit held that seniority systems do not automatically "negate" an employer's "duty to reasonably accommodate" the religious needs of applicants or employees. *Balint v. Carson City,* 180 F.3d 1047, 1053 (9th Cir. 1999). In this decision, the court pointed out that provisions for seniority systems and religious accommodations "coexist in the statute [Title VII] and are not mutually exclusive." *Id.*

The framework described in *Hardison* applies to the right of health care workers who wish to step aside from participating in procedures such as abortions or sterilizations. For example, nurses who object to participating in abortions as a direct result of religious convictions are, under Title VII, to be "reasonably accommodated" as long as the accommodation does not impose an "undue hardship" on the hospital. *Shelton v. University of Med. & Dentistry,* 223 F.3d 220, 225 (3d Cir. 2000). In *Shelton*, a nurse refused to participate in procedures that "directly or indirectly" ended lives. *Id.* at 222-23. The nurse provided hospital administrators with Bible verses that supported her position. *Id.* According to the court, this established that her religious beliefs were sincere, which shifted the burden to the hospital to reasonably accommodate her. *Id*. at 225. The hospital, which did not have enough staff to allow her to trade positions on an emergency basis, offered her a transfer to another department with no reduction in pay or benefits. *Id.* at 223. The court held that the offer of a transfer with equal pay and benefits to another department constituted a reasonable accommodation. *Id.* at 226. Because the nurse rejected these reasonable accommodations, she could not successfully challenge the hospital's efforts to comply with Title VII. *Id.* at 228.

The Religious Freedom Restoration Act

The "Religious Freedom Restoration Act" (RFRA) serves as a protection against the federal government's intrusion on one's religious liberty and freedom of conscience.[12] As part of RFRA, the government may only "substantially burden" one's exercise of religion if it demonstrates that the burden to the person furthers a compelling governmental interest and is the least restrictive means of furthering that interest.[13] RFRA explicitly provides for judicial relief to those whose religious exercise has been burdened due to a violation of this law.[14]

It is important to emphasize that RFRA protects employers as well as employees. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that privately held, for-profit corporations did not have to comply with Department of Health and Human Service (HHS) regulations that were contrary to the business owners' religious beliefs. 573 U.S. 682, 690 (2014). In *Hobby Lobby*, the Supreme Court held that the HHS regulations at issue, which mandated that corporations provide contraceptive coverage (including abortion-inducing drugs), violated RFRA. *Id*. at 736. By applying RFRA to organizations like Hobby Lobby, the Supreme Court effectively ushered in a new era of protections for the religious principles and freedom of conscience rights of private businesses.

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[12] RELIGIOUS FREEDOM RESTORATION ACT OF 1993, 1993 Enacted H.R. 1308, 103 Enacted H.R. 1308, 107 Stat. 1488, 1489

[13] *Id*.

[14] *Id*.

Following *Hobby Lobby*, the Supreme Court held in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, that the federal government had the authority to craft religious exemptions for organizations that opposed the contraceptive mandate on religious grounds. 140 S. Ct. 2367, 2386 (2020). *Little Sisters of the Poor v. Pennsylvania* followed a prior case involving the Little Sisters of the Poor, a Catholic caregiving organization that objected to complying with the Affordable Care Act's contraceptive mandate. *Id*. at 2376. As a result of that first case, in 2017, federal agencies issued new rules which offered moral and/or religious exemptions from complying with the mandate. In response, Pennsylvania and several other states sued to have those exemptions enjoined, forcing the Little Sisters of the Poor and other religious employers to provide contraceptive coverage in violation of their religious beliefs. Ultimately, the Supreme Court ruled 7-2 in favor of the Sisters, and found that while Congress could have provided strict statutory protections for contraceptive coverage, it failed to do so. *Id*. at 2382. Because the agencies had the statutory authority to provide the Sisters with a religious exemption, the Court did not have to decide whether the contraceptive mandate violated RFRA. *Id*.

Filing a Complaint with the Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC), charged with enforcing Title VII, describes various ways how an employee can file a charge of discrimination based on the employee's belief that he/she has been discriminated against based on his/her religion.[15] A charge of discrimination is "a signed statement asserting that an employer, union or labor organization engaged in employment discrimination."[16] The charge of discrimination, which requests remedial action by the EEOC, *must* be filed before an employee can file a Title VII discrimination lawsuit against an employer in court. As a general matter, the charge of discrimination must be filed within 180 calendar days of the alleged act of discrimination.[17] This deadline will not be extended while the employee attempts to deal with the matter internally. It is therefore best to file the charge as soon as possible and to contact your local EEOC office for guidance.[18]

[15] *How to File a Charge of Employment Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/how-file-charge-employment-discrimination.
[16] *Filing a Charge of Discrimination: With the EEOC*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/filing-charge-discrimination.
[17] *Public Portal*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://publicportal.eeoc.gov/Portal/Login.aspx.
[18] *EEOC Field Offices*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://eeoc.gov/field-office.