



REPRODUCTIVE RIGHTS & HEALTH

TRUMP ADMINISTRATION PROPOSES SWEEPING RULE TO PERMIT PERSONAL BELIEFS TO DICTATE HEALTH CARE

On January 26, 2018 the Trump Administration Department of Health and Human Services proposed a broad and harmful rule allowing individuals and entities to use their beliefs to block patients from getting the care they need. This rule is the latest attempt by the Administration to enshrine discrimination in virtually all facets of health care.

THE PROPOSED RULE CREATES NEW RIGHTS TO USE PERSONAL BELIEFS TO DENY PATIENT CARE

The Proposed Rule attempts to carve out new ways for individuals and entities to refuse to provide patient care.

- The Proposed Rule would allow individuals to refuse to provide any part of a health service program. The Trump Administration's intent is to protect, for example, doctors who refuse to provide services to transgender individuals or nurses who refuse to participate in fertility treatment for same sex couples. This is a misinterpretation – and unlawful expansion – of a provision of current federal law, which applies only in the context of biomedical research.
- The Proposed Rule provides a broad definition of what it means to “assist in the performance” of an activity to which an individual or entity is opposed. The definition greatly expands not only the types of services that can be refused, but also the individuals who can refuse. The definition includes any “member of the workforce” whose actions have merely an “articulable connection to a procedure, health service or health service program, or research activity.” It specifically includes “counseling, referral, training, and other arrangements for the procedure, health service, or research activity.” This definition could sweep in a broad range of people, including receptionists, hospital room schedulers, and other staff, volunteers, or trainees who could assert a new right to refuse to do their jobs.

- The Proposed Rule creates a definition of “referral” where one did not exist before. The definition goes beyond any common understanding of the term, allowing refusals to provide any information that could help an individual to get the care they need. The Proposed Rule does not even require that patients be informed of the individual's or entity's refusal to provide care, information, referrals, or other services, leaving patients unaware that they might not be getting the care they need from someone in whom they have placed their trust.

THE PROPOSED RULE EXPANDS EXISTING HARMFUL REFUSAL LAWS ON ABORTION AND STERILIZATION

Individuals seeking abortion or sterilization services are already subjected to harmful federal laws that permit individuals and health care entities like hospitals, doctors, or nurses to refuse to treat them. The Proposed Rule misinterprets those existing federal laws and attempts to stretch them far beyond their reach by unlawfully redefining statutory language.

Combined with the Proposed Rule's expanded definitions of covered entities, patients seeking abortion face greater threats to their health, life, and future fertility than they did under the already existing laws. For example, this Proposed Rule could allow a receptionist to refuse to schedule a patient's abortion, or an ambulance driver to refuse to transport a woman who needs care for a miscarriage.

The Proposed Rule also expands the definition of “health care entity” under existing law to include plan sponsors and third party administrators, which would allow employers to refuse to provide insurance coverage of abortion to their employees, even when such coverage is otherwise required by law. This attempted expansion is in direct conflict with the plain text of existing law, and goes against OCR's own interpretation of federal law, as recently as 2016.



THE PROPOSED RULE ENDANGERS WOMEN’S HEALTH AND LIVES BY FAILING TO PROTECT PEOPLE IN EMERGENCY SITUATIONS

The Proposed Rule puts women’s lives and health in danger by failing to ensure that people will receive care in emergency situations. Health care providers are under legal obligations, as well as medical professional and ethical obligations, to provide patients with care in emergencies. Despite these obligations, some health care providers have turned away a woman seeking an abortion, or information about abortion, even when her life is in jeopardy. These practices have resulted in infertility, infection, and even death. The Proposed Rule fails to acknowledge these obligations or to ensure patients will be treated when their lives are in jeopardy. This will embolden health care providers who refuse to provide care in emergency situations, and will also create confusion with respect to existing requirements to provide emergency care.

THE PROPOSED RULE MISCONSTRUES AND THROWS INTO CHAOS NON-DISCRIMINATION LAW

The Proposed Rule defines “discrimination” for the first time, in a way that subverts the language of landmark civil rights statutes to shield those who would discriminate rather than to protect against discrimination. This definition, along with its prioritization of religious beliefs without consideration of harm to individuals, threatens to undermine core civil rights principles that protect access to health care. For example, the Proposed Rule is contrary to existing federal employment law, Title VII, which provides a careful balance of protecting the religious beliefs of all employees – including health care providers – while also allowing employers to ensure that patients get access to vital health care services and information.

THE PROPOSED RULE GRANTS OCR NEW AUTHORITY IT HAS NEVER HAD BEFORE, ONLY FOR PROTECTING THOSE WHO SEEK TO DISCRIMINATE

The Proposed Rule seeks to expand OCR’s current responsibilities to enforce the existing harmful federal religious exemption laws on abortion and sterilization. Although OCR already has authority to receive and coordinate complaints and provide education about those laws, the Proposed Rule attempts to expand OCR’s ability use a broader range of enforcement mechanisms. Under the Proposed Rule, rather than just handling complaints, OCR would exercise broader power, including investigating entities even when there is no complaint against them, taking other remedial action, and referring cases to the Department of Justice. This expanded authority is a solution to a problem that does not exist. HHS itself stated in the Proposed Rule that only 10 complaints had ever been filed under the federal refusal laws before November 2016.

Additionally, the Proposed Rule expands OCR’s authority to enforce a significantly larger universe of federal statutes over which it has never had authority.

The Trump Administration is creating this enforcement authority alongside a new division within OCR focused only on protecting those who want to use their personal beliefs to dictate patient care. Rather than focusing only on those who want to discriminate, OCR should be enforcing the actual non-discrimination provisions in health care that ensure individuals’ access to care. This includes the non-discrimination provision of the Affordable Care Act, which protects people from discrimination in health care based on race, color, national origin, sex – including sex stereotyping and gender identity- age, and disability. Yet, HHS has signaled its intent to rollback that groundbreaking non-discrimination protection.

The Trump Administration’s continued prioritization of personal beliefs over patients’ equal access to care is a perversion of HHS’s mission.

This Proposed Rule is a broad and dangerous expansion of existing law, granting new rights to those who believe their personal beliefs should determine the care a patient receives. It is the latest in this Administration’s attempts to roll back the rights of women and LGBTQ individuals—many of whom, in particular individuals of color and those struggling to make ends meet – already face barriers in accessing the full range of health services and coverage that meets their health needs.

