WHAT YOU NEED TO KNOW ABOUT FLORIDA'S PARTIAL REPEAL OF ITS CERTIFICATE OF NEED LAW

On June 26, 2019, Florida Governor Ron DeSantis signed into law a bill dramatically limiting substantial portions of Florida's Certificate of Need ("CON") program. The new law takes effect in two phases. Effective July 1, 2019, general hospitals, comprehensive rehabilitation and "tertiary"[i] health services, such as pediatric cardiac catheterization, pediatric open-heart surgery and neonatal intensive care units, will no longer be required to obtain a CON.[ii] Effective July 1, 2021, specialty medical, rehabilitation, psychiatric and substance abuse hospitals will no longer be subject to CON requirements.[iii]

KEY TAKEAWAYS

1. Some Health Care Facilities Remain Subject to Florida's CON Requirements.

Although providers and developers will no longer need a CON for new general hospitals and "tertiary services," other types of new developments in Florida will still need approval from Florida's Agency for Health Care Administration ("AHCA"). For example, CON approval will still be necessary for many post-acute care facilities (e.g., nursing homes).[iv] It appears this exclusion from the repeal resulted from lobbying from the Florida Health Care Association, which pointed to other states like Indiana and Texas where new post-acute facilities found it difficult to fill their beds.[v]

2. Other States May Consider Legislation Repealing CON Requirements.

Florida is not the first state to limit or repeal its CON program in recent years. Fifteen states have already eliminated their CON programs,[vi] seemingly without regard for political ideology. Republican-dominated Texas and Democrat-led California each repealed their CON programs, and New Hampshire became the newest member of the group, eliminating its CON requirements less than two years ago.[vii] Legislators in at least three more states (North Carolina, Georgia, and Alaska) introduced legislation seeking to repeal or otherwise reform their states' CON programs.[viii]

Other states found more indirect ways of limiting CON programs. Some states have included sunset provisions in the CON statute requiring the program to be approved again at a later date.[ix] Other state CON programs exempt broad categories of health care facilities, as, for example, Connecticut exempts many post-acute facilities and hospital rehabilitation facilities.[x] As more states like Florida largely repeal their CON statutes, providers should expect other states to find either direct or indirect ways of removing CON requirements.

3. Florida May See Increased Development of Micro-Hospitals.

Health care systems in states without CON programs have seen a growth in the number of micro-hospitals located for a number of years. There is no specific regulatory definition of a "micro-hospital," but they typically have less than 10 beds and often an even smaller average daily census, but a significant outpatient component: ER, imaging and various ancillaries built around the small inpatient footprint and therefore eligible for hospital reimbursement. In 2017, CMS issued a clarification on how it applies the longstanding statutory requirement that a facility must be "primarily engaged" in providing inpatient care to be considered a hospital for Medicare purposes.[xi] The main takeaway was that state licensure as a hospital is not sufficient to guaranty Medicare hospital status. Additional requirements must be met to obtain an initial Medicare survey and maintain hospital status if approved.

The micro-hospital business model in other areas of the country is often presented to health care systems as a joint venture opportunity with an investor/management company to operate this smaller footprint facility. This joint venture model may have some merit, but it effectively precludes the new hospitals from qualifying for Medicare add-on payments and 340B status that system facilities commonly obtain. Some systems instead deploy the "micro-remote location" model, in which the micro-facilities operate as separate inpatient campuses of an existing hospital, with or without a management company. Systems interested in the "micro" concept should be sure to evaluate all the considerations that come along with the various models.

4. Florida Health Care Systems Effectively Have New Strategic Options.

Apart from the micro-hospital model, the ability to open new inpatient sites without CON approval presents significant new strategic opportunities and threats for Florida providers. In evaluating these situations, systems should understand the many legal and regulatory considerations in creating new inpatient facilities, including, without limitation:

- Licensure considerations;
- Accreditation considerations;
- Medicare certification and start-up gaps;
- Medicare start-up capital cost reimbursement opportunities;
- Medicare add-on payment differences for a new hospital vs. an existing provider;
- 340B eligibility;
- The Medicare multi-campus/remote location structure; and
- State Medicaid implications.

5. The Effect on Lowering Health Care Costs Remains an Open Question.

Although the financial effect of the new law may not be known for years, the expected growth in the development of Florida facilities previously requiring a CON may lead to greater competition in the industry. The existing CON program created a barrier to entry for many Florida providers or developers who may not have been able to afford steep CON costs, or who otherwise may have been unable to obtain a CON (from February 2017 to February 2019, Florida's AHCA rejected a little over a third (14 of 40) of CON applications).[xii] As more facilities are constructed and, as a result, consumers have more options for care, providers may reduce costs to attract patients. For example, the number of outpatient services and facilities rose in Pennsylvania following the repeal of its CON program.[xiii]

At the same time, less restricted growth may lead to unnecessary duplication and overutilization of health care services, potentially accelerating health care spending. Without CON requirements, there is at least a possibility that such spending could also increase as providers spend more money on capital expenditures (i.e., constructing a new facility). Further, most providers are currently reimbursed at a prospective rate based on specific diagnoses, irrespective of an individual facility's or provider's actual spending. As a result, providers have little motivation to invest in expensive projects with low projected financial return.

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Special thanks to Danielle Elalouf and Makda Gebremichael for their assistance with the preparation of this article.

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[i] *See* Fla. Stat. § 408.032 *(*repealed in part 2019), providing examples of tertiary services, including, but not limited to, "pediatric cardiac catheterization, pediatric open-heart surgery, organ transplantation, neonatal intensive care units, comprehensive rehabilitation, and medical or surgical services which are experimental or developmental in nature to the extent that the provision of such services is not yet contemplated within the commonly accepted course of diagnosis or treatment for the condition addressed by a given service."

[ii] Florida House Bill 21 § 13 (2019), https://www.flsenate.gov/Session/Bill/2019/00021.

[iii] *Id.*

[iv] *Certificate of Need State Laws*, Nat'l Conf. St. Legislatures (Feb. 2019),

http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx.

[v] Christine Sexton, *House Approves Bill Repealing Certificate of need Regulations on Hospitals*, South Fla. Sun Sentinel (Mar 21, 2019), https://www.sun-sentinel.com/news/florida/fl-ne-nsf-house-approves-con-health-bill-20190321-story.html.

[vi] U.S. Dep't of Health & Human Servs., U.S Dep't of Treasury, U.S. Dep't of Labor, Reforming America's Healthcare System Through Choice and Competition 51 (2018), https://home.treasury.gov/system/files/136/Reforming_Americas_Healthcare_System_Through_Choice_and_Competition.pdf

[vii] Nat'l Conf. St. Legislatures, *supra* note 3.

[viii] Eric Oliver, *4 States Considering CON Reform*, Becker's ASC Rev. (Apr. 24, 2019), https://www.beckersasc.com/asc-coding-billing-and-collections/4-states-considering-con-reform.html.

[ix] U.S. Dep't of Health & Human Servs, *supra* note 4 at 51.

[x] Conn. Gen. Stat. Ann. § 19a-638.

[xi] Brian Jent, Regan Tankersley & Lauren Hulls, *CMS Clarifies Definition of Hospital: What It Means to Be "Primarily Engaged*," Hall Render (Sept. 6, 2017), https://www.hallrender.com/2017/09/07/cms-clarifies-definition-hospital-means-primarily-engaged/?zoom_highlight=primarily+engaged.

[xii] CON Decisions & State Agency Action Reports, Florida Agency for Health Care Administration (last visited July 1, 2019), https://ahca.myflorida.com/MCHQ/CON_FA/Batching/decisions.shtml.

[xiii] Maria Castellucci, *Weighing CON Laws Against Push for Greater Transparency*, Mod. Healthcare (Apr. 11, 2017), https://www.modernhealthcare.com/article/20170411/NEWS/170419979/weighing-con-laws-against-push-for-greater-price-transparency.