

Blog Post

Multiple States Considering Possible Modification to Their “Certificate of Need” Laws

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In December, the U.S. Department of Health and Human Services issued a report – [“Reforming America’s Healthcare System Through Choice and Competition”](#) – expressly calling upon the states to repeal their “Certificate of Need” (CON) laws. In the report, HHS indicated that the existence of such laws – which typically prevent healthcare providers from expanding their services/entering new markets absent their ability to demonstrate to state regulators that there is an unmet need for such services in the community – has been a significant cause of escalating healthcare costs.

Perhaps in response to this prodding, legislation has recently been introduced in several states that would modify their respective CON laws. In Georgia (HB 198), South Carolina (HB 3823), Virginia (HB1680) and Alaska (HB 17), for example, legislation has been proposed that would either reduce the scope of such laws or repeal them altogether. In contrast, in Indiana, legislation (S. 573) has been introduced that would create a new CON law, something that has not occurred in any state in quite some time. Additionally, while not yet introduced, Florida is also expected to consider changes to its CON laws this legislative session as well.

As explained in the HHS report, CON laws arose in response to a 1974 federal law that required the

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states to enact such legislation in order to obtain federal funding. However, this obligation was repealed in 1986, and since then, federal regulators have become increasingly opposed to the continued existence of state CON laws. As the DOJ Antitrust Division and the Federal Trade Commission have argued, such laws raise “competitive concerns” and “the evidence does not suggest that CON laws have generally succeeded in controlling costs or improving quality” of healthcare. The FTC has also testified in support of the repeal of state CON laws; for example, last year, in response to an earlier legislative proposal in Alaska, the FTC testified that the Alaska CON law “creates barriers to entry and expansion” of services in the state and that it potentially “suppresses more cost-effective, innovative and higher quality healthcare options.” The FTC also warned that such laws can be “exploited by competitors seeking to protect their revenues” and that they may “facilitate anticompetitive agreements” among existing providers. Despite the FTC’s support for the bill, it failed to be enacted into law.

As noted above, several states have either introduced (or reintroduced) CON repeal bills this year. Whether the Trump administration’s new, added encouragement that these laws be repealed, or the continuing escalation of healthcare costs generally, will have any impact on these new legislative proposals remains to be seen. Stay tuned.

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