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Blog Post

Florida Legislature Repeals its "Certificate of Need" Law

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In a somewhat surprising move, on April 29, 2019 the Florida Legislature passed legislation (HB 21) that repeals the state's "Certificate of Need" (CON) laws with respect to general hospitals and tertiary services. Such laws, which are in place in many states, typically prohibit a healthcare provider from expanding its services and from entering new markets absent its ability to demonstrate to state regulators that there is an unmet need for such services in the target community. The Legislature's action comes during the last week of the legislative session, and after numerous unsuccessful efforts to pass such legislation over the last several years. HB 21 now goes to Governor DeSantis for approval, and if signed, general hospitals and providers of tertiary services will be free of this requirement beginning in July (the legislation also provides that specialty hospitals will no longer be subject to the CON law starting in 2021; at least for now, nursing homes and hospices would still be subject to the CON regulations).

Notably, the passage of this legislation in Florida comes after the federal government aggressively pushed the states to repeal their CON laws late last year. Specifically, in December, the U.S. Department of Health and Human Services issued a report – "Reforming America's Healthcare System Through Choice and Competition" – that argued that the existence of such laws has been a significant cause

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of escalating healthcare costs. In response to that report, legislation was introduced earlier this year in Florida (and several other states) to repeal their CON laws.

As explained in the HHS report, CON laws arose in response to a 1974 federal law that required the 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 However, this obligation was repealed in 1986, and since then, federal regulators have become increasingly opposed to the continued existence of state CON laws. In addition to the HHS report, the DOJ Antitrust Division and the Federal Trade Commission have repeatedly maintained that such laws raise "competitive concerns" and that "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, consistently arguing that they "create barriers to entry and expansion" of services and that they potentially "suppress more cost-effective, innovative and higher quality healthcare options." The FTC has also contended that CON laws can be "exploited by competitors seeking to protect their revenues" and that they may "facilitate anti-competitive agreements" among existing providers. On the other hand, CON advocates maintain that such laws help to ensure that care is offered in areas of the state that might otherwise be ignored, and that existing facilities have adequate volume to enhance the quality of the services they provide.

With passage of HB 21, CON repeal efforts now move on to the other states where such legislation has been introduced, including Alaska, Georgia and South Carolina. Whether CON repeal proponents in those states will achieve similar success to that achieved in Florida remains to be seen. Stay tuned.

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