

Conscientious Refusals

Religiously-motivated conscientious refusals to provide services in the workplace have increasingly become a topic for debate. From the 2014 Supreme Court decision in the Hobby Lobby case, to health care providers who believe providing abortions violates their faith, to federal employees who object to issuing marriage licenses to same-sex couples, religiously motivated conscientious refusals are invoked by employees who work in a variety of industries and come from a wide range of religious backgrounds. This fact sheet provides an overview of the types of conscientious refusals that are most frequently emerging in different workplaces (i.e., health care, government, religious and a range of businesses) as well as better practices for both employers and employees who are looking to address their own or others' conscientious refusals.

Key Terms

Key terms to keep in mind when discussing conscientious refusals are:

Conscience: An inner state or faculty linked to an awareness of moral limits and to the ability to distinguish right from wrong.ⁱ

Conscientious Refusal: The desire or intent to refuse, or the actual refusal of, a course of action based on one's conscience.ⁱⁱ

Title VII: Title VII of the 1964 Civil Rights Act requires employers with 15 or more employees to provide reasonable accommodations for an employee's sincerely held religious beliefs and practices, as long as doing so would not provide an undue hardship (defined by the Supreme Court as "anything more than a *de minimis* cost or burden").ⁱⁱⁱ Some states have additional protections requiring employers with fewer than 15 employees to accommodate employees' religious beliefs; the number of employees required varies by state.

Religious Freedom Restoration Act (RFRA): A bill passed by Congress in 1993 and signed into law by President Bill Clinton, stating that a law should not substantially burden the free exercise of religion unless the government can demonstrate that it does so in furtherance of a compelling government interest, and in the least intrusive and restrictive way possible. RFRA only applies to federal laws, although many states have their own RFRA's that vary in detail and impact.^{iv}

Health Care Workplaces

Conscientious refusals show up in health care workplaces in a variety of ways, most commonly in relation to abortion but also related to contraceptives, sterilizations, assisted dying, reproductive technology, blood transfusions, stem-cell research^v, and sometimes other topics like LGBT health. In general, health care workplaces are not obligated to accommodate conscientious refusals when the procedure the employee refuses to perform constitutes a substantial portion of that employee's job duties. However, a health care workplace has a greater obligation to accommodate an employee who is asked on an infrequent basis to perform a procedure to which she/he objects on religious grounds.^{vi} For example, if a nurse's position

frequently requires her to assist in providing abortions, her employer is not obligated to accommodate her/his conscientious refusal, but may be required to accommodate another nurse's conscientious refusal if she/he is asked one time, under unusual circumstances, to assist in an abortion, provided that there are other nurses available who are willing to assist instead.

There are also important distinctions based on whether a refusal to provide a service is related to a patient's status or identity rather than the actual service. For example, some health care providers will provide in vitro fertilization for heterosexual couples but object to providing that same service to lesbian couples, due to their religious beliefs that children should be raised only by heterosexual couples. In this instance, the provider does not object to in vitro fertilization, but does object to providing this treatment to patients of a certain sexual orientation.^{vii}

In general, there is less legal and professional support for denying a service to a patient of a certain status than there is for denying the service to everyone. In fact, the American Medical Association states that a physician can ethically decline to enter into a doctor-patient relationship with a patient if the "specific treatment" requested conflicts with the physician's religious, personal, or moral beliefs, but may not refuse to provide treatment to a patient "because of race, color, religion, national origin, sexual orientation, gender identity, or any other basis that would constitute invidious discrimination."^{viii} Here, the issue is the identity of the individual requesting the service, and a prohibition on denying otherwise acceptable services to a person for that reason.

These issues are also playing out in the courts. In 2008, the California Supreme Court ruled on a case where physicians at a fertility clinic denied treatment to a lesbian couple, citing their religious beliefs as justification. The patient sued under a state law that prohibits discrimination by businesses offering public services on the basis on sexual orientation. The Court ruled that the fertility clinic was a business offering public services, and that the religious beliefs of the physicians could be overridden because California has a compelling state interest in ensuring equal medical care irrespective of patients' sexual orientation, and there is not a less restrictive means for the state to achieve this goal.^{ix}

This result is not currently universal across the United States. 19 states and the District of Columbia have enacted laws like California's that prohibit discrimination in public accommodations on the basis of sexual orientation. The other 31 states do not have such laws. In addition, there is currently no federal law prohibiting sexual orientation discrimination (although legislation to outlaw discrimination based on sexual orientation or gender identity was recently introduced in Congress).^x Thus, in Michigan, a state that does not outlaw discrimination on the basis of sexual orientation, a pediatrician was found to have lawfully cited her religious beliefs when she refused to treat a child whose parents are lesbians, forcing them to find an alternate healthcare provider.^{xi}

In health care settings, it is also important to balance a patient's right to treatment with a health care provider's right to exercise their religious beliefs, and to recognize that the religious beliefs of the patient may differ from the beliefs of the provider. In addressing this reality, professional and ethical standards generally agree that if there is a medical emergency and a non-objecting provider is not present, a provider must perform the necessary medical treatment even if she/he conscientiously objects. Others frame the issue as a difference between what an individual provider owes patients and what the medical profession as a whole owes patients. An individual provider may therefore opt out of providing a non-emergency service, as long as the patient can still receive that service by another medical professional or through another channel of the health care system. Patients are entitled to certain services—for example, emergency

contraception— and a pharmacist can only refuse to fill a prescription for emergency contraception if the patient can get the prescription filled elsewhere, in a timely and convenient way.^{xii}

Government Workplaces

Recently, conscientious refusals have emerged in government workplaces in states across the country specifically related to the Supreme Court's ruling in *Obergefell v. Hodges*, which now requires all states to provide marriage licenses for same-sex couples. Some government officials who are required to license or perform marriages are refusing to do so for same-sex couples, citing their religious beliefs. In Hood County, Texas, for instance, a County Clerk ordered her staff not to issue marriage licenses to same-sex couples, citing her right to religious liberty as justification. She later said that she would personally refrain from issuing these licenses, but that her staff were available to do so. Nonetheless, when Jim Cato and Joe Stapleton requested a marriage license, they were turned away until they filed a federal lawsuit that required the clerk to issue the marriage license. A similar issue arose in Ohio, where a municipal judge refused to marry two women in his court.^{xiii}

In some ways, these cases are different from the previously mentioned ones arising in health care workplaces. The key distinction is that these clerks and judges are employed by the government and responsible for upholding the U.S. Constitution and the interests of their employer.^{xiv} After the Supreme Court's ruling, these interests include the right of same-sex couples to marry. This responsibility, and the fact that these employees are paid through taxpayer money, suggests that they may not have the right to refuse to issue marriage licenses to same-sex couples, even if this refusal is based on their sincerely held religious beliefs. The legal right of government employees to refuse to issue marriage licenses to same-sex couples is still being decided. In the interim, some government employees who religiously object to issuing same-sex marriage licenses have opted to leave their jobs since the *Obergefell v. Hodges* ruling was issued, apparently because they determined they no longer could fulfill their essential job functions.

In other ways, the balancing strategies that have evolved for managing conscientious refusals in health care workplaces can offer guidance for government workplaces where employees refuse to issue these marriage licenses. Generally, issuing marriage licenses is a substantial portion of a County Clerk's job.^{xv} As such, refusing to do so arguably places an undue burden on the government, which has the responsibility to provide these licenses and a compelling interest in doing so in accordance with the *Obergefell v. Hodges* ruling. In such instances, employees could be required to issue the licenses. Perhaps, as is often true in health care institutions, employees could have the right to conscientious refusal if issuing these marriage licenses was only an occasional job function and one that could readily be performed by another employee in a timely fashion. That said, it should be noted that the objecting government employees were refusing to perform a service based on the status or identity of the individuals seeking the licenses, as opposed to refusing to perform the service in general. It remains to be seen whether this important distinction will lessen government employees' rights to conscientious refusal, as is sometimes the case within health care workplaces.

Whether or not allowing government employees to refuse to issue marriage licenses constitutes an undue burden will likely be decided on a case-by-case basis, and is still being played out on a national scale. In the 19 states and the District of Columbia that have laws prohibiting discrimination on the basis of sexual orientation in public accommodations (governmental entities and private businesses that provide services to the general public),^{xvi} refusing to issue marriage licenses to same-sex couples would likely constitute illegal discrimination (in the same way that religious beliefs cannot be used to justify racial segregation and

discrimination).¹ In states lacking such anti-discrimination laws and absent a federal statute prohibiting discrimination based on sexual orientation, what will transpire in government offices remains to be seen.

It also remains to be seen whether Title VII's protections against discrimination on the basis of gender will be used to protect same-sex couples' right to marriage licenses. Absent a federal statute protecting discrimination on the basis of sexual orientation, courts have used Title VII's protections against sex discrimination for stereotyping theory (i.e. a gay men perceived to be feminine may be able to claim sex discrimination if he suffers an adverse employment action because he does not fit a male stereotype) or a more straightforward charge of sex discrimination. It is possible that such legal interpretations will lead to protections for same-sex couples seeking marriage licenses, since in the case mentioned above a marriage license would be granted if a man were marrying a woman, but was not granted to a man marrying another man, meaning that the couple applying for the marriage license was discriminated against because of their gender).

Religious Workplaces

In addition to individual employees who conscientiously refuse to provide a certain service, some institutions exert the right to conscientious refusal on the basis of their institutional religious identity. In general, religious institutions are granted certain rights to conscientious refusal and exempted from various laws accordingly. For example, the Affordable Care Act's requirement that employers cover contraception in their insurance plans specifically exempted religious employers. That said, there are many types of religious employers (houses of worship, faith-based non-profits, religiously affiliated educational institutions, or even for-profit companies), and there are ongoing legal debates about what types of refusals different religious workplaces are entitled to exert.²

Some people object to religious institutions' right to conscientious refusal, based primarily on the concern that providing for an institution's conscience may undermine individuals' right to uphold their own consciences. For example, a health care institution could conceivably accommodate individual health care providers who conscientiously refuse to provide abortions. However, a Catholic health care institution that conscientiously refuses to provide abortions prevents health care workers who do not share those religious or moral beliefs from providing this service.^{xvii} In areas of the country where Catholic hospitals are the only nearby providers, this also keeps women who hold different beliefs from those guiding the hospital from accessing their legal right to reproductive health services such as abortion.

Allowing institutions to exert the right to conscience can also lead to discriminatory hiring practices. Until recently, the Salvation Army, an evangelical Christian movement that is publically funded for charity work, asked employees about their religious beliefs and practices, including their church attendance and the names of their ministers, and then required employees to endorse the organization's evangelical Christian mission. Employees who refused to do so were fired or threatened with termination. By exercising an institutional right to conscience, the Salvation Army effectively made employment contingent on an individual employee's willingness to give up their own conscience when it would have precluded them from endorsing the Salvation Army's religious beliefs or proselytizing while performing publically funded charity work. In a 2014 settlement, the organization agreed to end these practices (after being sued by 19 former employees).^{xviii}

¹ Ibid.

² Galston, W. & Rogers, M. (2012). Health Care Provider's Consciences and Patients' Needs: The Quest for Balance. *The Brookings Institution*

For-Profit Workplaces

For-profit companies are also increasingly claiming the right to exercise conscientious refusal on religious grounds. Most notably, the 2014 case *Hobby Lobby v. Burwell* grappled with this issue. In that case, the owners of the closely held for-profit companies Hobby Lobby, Conestoga Woods, and Mardel claimed that their sincerely held Christian beliefs allowed them to opt out of the Affordable Care Act's (ACA) requirement that employers' health plans provide preventive care, including contraception, to female employees. Specifically, these companies objected to four types of birth control that may prevent a fertilized egg from attaching to the uterus, believing that these particular contraceptives are abortifacients that violated the beliefs of the company's owners that life begins at conception.

As noted above, the ACA already had a provision exempting religious employers, defined as houses of worship and religious non-profits, from providing contraceptive services in their insurance plans. In a 5-4 decision, the United States Supreme Court ruled that under RFRA this exemption should be extended to closely held for-profit corporations. The majority opinion, authored by Justice Samuel Alito, stated that "Protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies." In a dissenting opinion, Justice Ruth Bader Ginsburg argued that churches and other religious workplaces have a different right to conscience than for-profit workplaces, arguing that "Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations."^{xix}

In response to this decision, the Obama administration recently released new guidelines allowing closely held businesses with religious objections to opt out of the ACA's contraception mandate, in accordance with the Hobby Lobby decision. These new guidelines define a "closely held for-profit entity" as a company that is not publically traded and has an ownership structure under which more than 50% of the ownership interest is held by five or fewer individuals, with family members counting as a single owner. The new rules allow women to obtain birth control at no cost, but these services would be paid for by insurers separately from the employer's health plan. To qualify for a religious exemption, the highest governing body (i.e. a board of directors) for a closely-held for-profit company needs to adopt a resolution certifying their religious objection to providing contraceptive services and then send a letter or form to either the government or to their insurers.^{xx}

The Hobby Lobby decision was specifically related to the ACA's contraception mandate, and does not address a company's right to discriminate in hiring in the name of the company's religious beliefs. Justice Alito wrote that "the Government has a compelling interest in providing equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal"^{xxi} even if, for example, a company's owners had religiously motivated beliefs regarding racial segregation. How this principle of equal opportunity is applied remains to be seen.

Beyond the specifics of the Hobby Lobby decision, some private businesses are claiming a religious right to refuse services to same-sex couples. Whether such businesses legally have this right generally depends on whether the business is based in a state that has laws protecting against discrimination on the basis of sexual orientation. In states that do have such laws, religious rights to refusal are usually considered by courts to be illegal discrimination.^{xxii} In other states without such laws, religious business owners' right to refuse services to people on the basis of sexual orientation is less clear, since many cases that will help

clarify this issue are still making their way through the courts.^{xxiii}

For example, in Oregon—a state that has laws prohibiting discrimination in public accommodations on the basis of sexual orientation—the owners of a bakery called Sweet Cakes by Melissa was fined \$135,000 for refusing to make a wedding cake for a same-sex couple based on their religious beliefs. As cases like the one in Oregon continue to unfold throughout the country in states with and without protections against discrimination based on sexual orientation, pressure may mount for a national decision on the legality of such refusals.^{xxiv}

Better Practices

Issues of conscientious refusal are extremely complex. They involve people's core beliefs and sometimes pit those beliefs against the beliefs of others or even against the prevailing law. Employers need to recognize this complexity and then seek ways to legally balance employees' religious beliefs while ensuring that patients, clients, customers, or other constituents do not face discrimination and do receive the benefits and services to which they are entitled. How to best achieve that balance will vary from case to case, but there are some overarching principles that both employers and employees can follow.

Better practices for employees who are asked to perform a professional responsibility that violates their religious beliefs include:

- Try to seek a compromise regarding the component of the task that is causing the objection.
- Inform supervisors and other relevant parties (i.e. Human Resources and legal teams) about potential sources of conscientious objections, *before* a problem arises – this will give the workplace an opportunity to try to proactively accommodate the objection in a way that does not burden either the employee or the other party involved (i.e. patient or customer).
- Consult with relevant personnel (a supervisor, Human Resources personnel, legal team, etc.) for further guidance on managing a refusal and whether following a certain course of action would or would not violate legal or professional standards.

In some cases, an employee might refuse to provide a service (an employee's legal right to do so will vary on a case-by-case basis). However, while employees may have the right to step away from providing a service, they may not step in between a person and the service they have requested (i.e., a pharmacist may be allowed to refuse to fill a prescription for birth control, if the patient can still get the prescription filled easily and in a timely way, but the pharmacist cannot tear up the prescription and therefore prevent the patient from getting that prescription filled elsewhere).^{xxv}

Better practices for employers whose employees are refusing to perform a professional responsibility because doing so violates their religious beliefs include:

- When possible, try to grant an accommodation for religiously motivated conscientious refusals as well as other religious beliefs and practices that emerge in the workplace. Tanenbaum's Accommodation Mindset tool helps employers get ahead of the curve in developing accommodations for the conflicts that arise within a diverse employee population. Keep in mind that employees who need an accommodation may be concerned about reprisals or negative opinions from their supervisors, so it is important that employers create an environment where employees feel

safe to report their religious obligations and instances where an accommodation might need to be made.

- **Manage behavior, not belief:** An employer cannot and should not try to change what their employees believe, but they can expect their employees to behave in accordance with certain standards established by the company in the workplace.
- **Follow relevant laws and policies:** Employers should try to accommodate religious beliefs and practices, including conscientious refusals, when possible – but companies must also defer to relevant laws and institution-specific non-discrimination policies if accommodating an employee’s religious beliefs would cause an undue hardship or discriminate against a patient, client, customer, or other constituent. (Note that government employees are often held to different standards than employees of corporations and other organizations).

For more information about conscientious refusals in the workplace, or to schedule a consultation, email membership@tanenbaum.org.

ⁱ Galston, W. & Rogers, M. (2012). Health Care Provider’s Consciences and Patients’ Needs: The Quest for Balance. *The Brookings Institution*

ⁱⁱ McLeod, M. (2011). *The Spark of Conscience Inflames Debate: Conflicts of Conscience in Health Care*.

ⁱⁱⁱ Galston, W. & Rogers, M. (2012). Health Care Provider’s Consciences and Patients’ Needs: The Quest for Balance. *The Brookings Institution*

^{iv} Ibid.

^v Ibid.

^{vi} Ibid.

^{vii} Ibid.

^{viii} http://www.ama-assn.org/ama1/pub/upload/mm/Code_of_Med_Eth/opinion/opinion1005.html

^{ix} North Coast Women’s Care Medical Group v. Superior Court, 44 Cal. 4th at 1158.

^x <http://www.advocate.com/politics/2015/07/21/sweeping-lgbt-rights-bill-be-introduced-week>

^{xi} <http://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/>

^{xii} Galston, W. & Rogers, M. (2012). Health Care Provider’s Consciences and Patients’ Needs: The Quest for Balance. *The Brookings Institution*

^{xiii} <http://www.nytimes.com/2015/07/10/opinion/illegal-defiance-on-same-sex-marriage.html?action=click&pgtype=Homepage&module=opinion-c-col-left-region®ion=opinion-c-col-left-region&WT.nav=opinion-c-col-left-region>

^{xiv} <http://www.washingtonpost.com/blogs/the-fix/wp/2015/06/29/can-a-texas-county-clerk-refuse-to-issue-a-gay-marriage-license-its-complicated/>

^{xv} <http://www.naco.org/sites/default/files/documents/Role%20of%20the%20County%20Clerk.pdf>

^{xvi} http://www.hrc.org/state_maps

^{xvii} Ibid.

^{xviii} <https://www.au.org/blogs/wall-of-separation/army-surrenders-religious-charity-gives-up-on-fight-to-discriminate>

^{xix} http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf

^{xx} <http://www.nytimes.com/2015/07/11/us/health-laws-contraceptive-rule-eased-for-businesses-with-religious-objections.html>

^{xxi} http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf

^{xxii} <http://thinkprogress.org/lgbt/2015/02/19/3624626/washington-florist-loses-religious-freedom-anti-gay-discrimination/>

^{xxiii} <http://www.indystar.com/story/news/politics/2015/03/29/religious-freedom-law-really-means-indiana/70601584/>

^{xxiv} https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/06/why-may-the-government-ban-businesses-from-saying-we-wont-bake-cakes-for-same-sex-weddings/?wprss=rss_opinions

^{xxv} Culhane-Pera, K., Vawter, D., Xion, P., Babbitt, B., & Solberg, M. (2003). *Healing by heart*. U.S.A: Vanderbilt University Press.