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LegisBrief

A QUICK LOOK INTO IMPORTANT ISSUES OF THE DAY

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States Modernizing Certificate of Need Laws

Did You Know?

- Certificate of Need (CON) programs regulate the number of health care facilities and services in a given area.
- Twelve hospitals started facility expansions and renovations worth $1 billion or more in 2018.
- Fourteen states have a moratorium on establishing, expanding or acquiring certain health care facilities.

BY JACK PITSOR

As state policymakers determine ways to control health care costs and increase access to care, many have considered changes to state regulations governing the development of health care facilities and services, known as certificate of need (CON) laws. CON laws are state regulatory mechanisms for establishing or expanding health care facilities in a given area. The intent is to determine whether a new health care project—like a nursing home increasing its bed capacity or a hospital acquiring an MRI machine—meets a need in the community. In a state with a CON program, a health care facility must seek a health planning agency's approval based on a set of criteria and community need.

Currently, 35 states and Washington, D.C., operate some form of a CON program. The extent to which a CON program regulates health care facilities varies greatly state to state. For example, Kentucky CON laws apply to over 24 different types of health care facilities while neighboring Ohio regulates only long-term care facilities.

Proponents of CON programs believe they control costs by evaluating the demand for services—regulators can prevent duplicating unnecessary services that otherwise would drive up costs. They also argue CON programs can distribute services to medically underserved areas, like rural communities. Major health care providers are more willing to provide services in affluent cities and suburbs. CON regulations, however, may prevent the high concentration of services in these areas, thus promoting access to care in rural and low-income communities.

Opponents of CON programs argue that CON laws are anti-competitive and restrict necessary services from locating in rural and medically underserved areas. They believe the overly burdensome approval process—which may result in a new health care project being denied—protects incumbent providers and stifles innovation. Additionally, opponents say there is little to no evidence of claims that CON programs lower health care costs or promote care for indigent patients. Instead, they argue, CON programs' anti-competitive nature allows for lower quality care at higher costs.

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Subsequently, many states adopted Section 1122 waivers, which provided federal funding for the review and approval of new health care services receiving Medicare and Medicaid reimbursements.

Nearly a decade later, the federal Health Planning Resources Development Act of 1974 required states to create an approval process for health care facilities before incurring major capital expenditures. The federal law bolstered funding for states to administer CON programs with the goal of preventing states from investing in expensive health care services where they were not needed.

By 1982, every state except Louisiana operated some form of regulatory approval process resembling the federal CON model. This meant states maintained broad regulatory oversight of several facilities—including hospitals, nursing and intermediate care facilities, and ambulatory surgery centers—as well as the expansion or development of a facility's service capacity.

Several states, however, repealed their CON laws after the federal mandate and funding for CON was repealed in 1987—and many continue to consider modifications to CON laws.

State Action

While the effectiveness of CON programs continues to be debated, many states have recently introduced or enacted legislation to change their CON program. These changes range from fully repealing an existing CON program to creating a new one.

■ **Full Repeal of CON Laws.** New Hampshire fully repealed its CON program in 2016 and switched to a licensure review process, which requires certain standards for accrediting and licensing new providers and services. Now, through its licensing process, the state maintains oversight of new specialized services, new facilities within 15 miles of a critical access hospital and hospital emergency departments.

■ **Modifications to CON Laws.** Nine states—Florida, Georgia, Maryland, Ohio, Rhode Island, Tennessee, Vermont, Virginia and Washington—enacted legislation in 2019 to modify CON regulations for certain health facilities and services. For example, Florida lawmakers enacted legislation to repeal portions of its CON law, after initially considering full repeal. The 2019 bill exempts several health facilities and services from regulation—including general hospitals, complex medical rehabilitation beds and tertiary hospital services—while maintaining CON approval for a limited number of health facilities, such as nursing homes.

■ **CON and Rural Access to Care.** Indiana created a CON program in 2018 by requiring the Indiana Department of Health to establish requirements and exemptions for a certification process. State lawmakers cited concerns over duplicative services in affluent suburbs and lack of services in rural communities as reasons for bringing back CON regulations, which the state initially repealed in 1999.

Some states concerned with potentially negative effects of CON laws on medically underserved rural communities are taking a different approach. For example, the Georgia House Rural Development Council recommended the state switch from a CON program to a licensing and accreditation process to improve access, quality and costs for rural Georgians. Subsequently, the Georgia General Assembly passed HB 186 in 2019 modifying the state's CON regulations. The bill increases financial thresholds for capital expenditure projects that require CON approval and limits a competitor's ability to object to a new health care project, among other provisions.

South Carolina lawmakers—both in favor of and opposed to pending legislation repealing the state's CON laws—advocated for improving access to care for rural communities during the 2019 legislative session. Proponents of HB 3823 argued repealing CON regulations would spur competition in rural areas lacking health care services; opponents believed a full CON repeal would hurt rural communities where fewer health care providers are typically willing to work.

■ **Legislative Task Forces or Committees.** Other states have established special committees or task forces to assess their CON laws and identify ways to modernize their program. For example, the Maryland Senate Committee on Certificate of Need Reform recommended several changes to its CON laws regarding the number of capital expenditures requiring CON approval and streamlining the regulatory process. The legislature passed SB 940 in 2019 adopting a number of the committee's recommendations.

Federal Action

The U.S. Department of Health and Human Services issued a 2018 report urging states to repeal or scale back CON requirements to increase competition. It recommended that "the Federal Trade Commission (FTC) make appropriate policy recommendations after ongoing research on the benefits and disadvantages of CON." The FTC has long argued for modifications to state CON laws; it recently favored legislation repealing or reforming CON regulations in Alaska, Tennessee and South Carolina.

Additional Resources

- NCSL CON–Certificate of Need State Laws
- American Health Planning Association—State CON Websites

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