

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 37.106.301, 37.106.310, and) PROPOSED AMENDMENT
37.106.330 pertaining to Health Care)
Facility Standards)

TO: All Concerned Persons

1. On August 19, 2024, at 9:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/85086633914?pwd=OkDOEabnO0VcRkR4tdNyB5G5kXPFsIP.1>, meeting ID: 850 8663 3914, and password: 338277; or

(b) Dial by telephone: +1 646 558 8656, meeting ID: 850 8663 3914, and password: 338277. Find your local number: <https://mt-gov.zoom.us/u/kbP4IBlh4L>.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on August 5, 2024, to advise us of the nature of the accommodation that you need. Please contact Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov.

3. The rules proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

37.106.301 DEFINITIONS (1) The following definitions apply in this subchapter:

(1) through (7) remain the same but are renumbered (a) through (g).

(2) For purposes of ARM 37.106.310 and 37.106.330, the following terms shall have the meaning assigned to them in 50-4-1101, MCA:

(a) "Conscience";

(b) "Discriminate" or "Discrimination";

(c) "Health care service";

(d) "Medical practitioner";

(e) "Participate in a health care service";

AUTH: 50-5-103, MCA

IMP: 50-4-1101, 50-5-101, 50-5-103, 50-5-104, 50-5-105, 50-5-106, 50-5-107, 50-5-108, 50-5-201, 50-5-202, 50-5-203, 50-5-204, 50-5-207, 50-5-208, 50-5-210, 50-5-211, 50-5-212, 50-5-225, 50-5-226, 50-5-227, 50-5-228, MCA

37.106.310 LICENSING: PROCEDURE FOR OBTAINING A LICENSE: ISSUANCE AND RENEWAL OF A LICENSE (1) through (4) remain the same.

(5) The department will not:

(a) require a health care facility to participate in a health care service that violates that facility's conscience;

(b) require that the facilities of a health care facility be made available for uses or purposes, including abortion, contrary to the facility's conscience, religious beliefs, or moral tenets or that of its staff or governing body;

(c) discriminate or take an action that constitutes discrimination (including an adverse licensure or other action) against a health care facility as a result of that facility's exercise of conscience;

(d) deny any health care facility any privileges or immunities, or deny it any public benefits as a result of its exercise of conscience; and/or

(e) discriminate against a health care facility that exercises whistleblower rights with respect to suspected violations of conscience rights or that testifies, assists, or participates, or intends to testify, assist, or participate, in a proceeding.

(6) For purposes of (5), a health care facility may establish a claim of conscience by reference to its governing documents as identified in 50-4-1101, MCA.

AUTH: 50-5-103, MCA

IMP: 50-4-1102, 50-4-1104, 50-5-103, 50-5-202, 50-5-203, 50-5-204, 50-20-111, MCA

37.106.330 MINIMUM STANDARDS FOR ALL HEALTH CARE FACILITIES: WRITTEN POLICY AND PROCEDURE (1) A current written policy and procedure manual that describes all services provided in the health care facility must be developed, implemented, and maintained at the facility. The manual must be available to staff, residents, resident family members, resident legal representatives, and the department and must be complied with by all facility personnel and its agents. Policies and procedures must be reviewed at least annually every other year by either the administrator or the medical director with written documentation of the review.

(2) All health care facilities must develop policies and procedures that, consistent with 50-4-1103, 50-4-1105, and 50-20-111, MCA, require the facility to not discriminate against medical practitioners who exercise their conscience, or First Amendment free speech rights, or take certain whistleblower actions. These policies and procedures must include:

(a) a medical practitioner's right not to participate in health care services that violate the medical practitioner's conscience;

(b) how a medical practitioner can exercise the right to conscience;

(c) that the health care facility will not consider a medical practitioner's refusal to participate in a health care service on the basis of conscience with respect to staff

privileges, as a basis for discrimination, other adverse action, and will not discriminate against a medical practitioner for exercise of conscience;

(d) that the health care facility will not discriminate against a medical practitioner who exercises whistleblower rights with respect to suspected violations of conscience rights or who testifies, assists, or participates, or intends to testify, assist, or participate, in a proceeding;

(e) maintenance and management of information on the exercise of conscience as confidential information, disclosed only on a need to know basis; and

(f) training of all staff on the foregoing.

(3) All hospitals, critical access hospitals, rural emergency hospitals, abortion clinics, outpatient centers for primary care, and outpatient centers for surgical services must develop a policy that if the facility performs abortions, they do not require medical practitioners to participate in such procedures unless such practitioners have affirmatively opted in to participate in such services in writing.

AUTH: 50-5-103, MCA

IMP: 50-4-1103, 50-4-1105, 50-5-103, 50-20-111, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing to amend ARM 37.106.301, 37.106.310, and 37.106.330.

The 2023 Legislature enacted House Bill No. 303: Implement Medical Ethics and Diversity Act. The bill was signed by the Governor on May 3, 2023. The department proposes to amend ARM 37.106.301, 37.106.310, and 37.106.330, in order to implement HB 303. The department believes that amendment of these rules is necessary to provide that the department will not discriminate against or otherwise take adverse action against health care facilities that exercise conscience rights. The department also proposes to require health care facilities develop policies that require the facility to not discriminate against medical practitioners who exercise their conscience, First Amendment free speech rights, or whistle blower rights, and to require hospitals, critical access hospitals, rural emergency hospitals, and other health care facilities that perform abortions to develop a policy that does not require medical practitioners to participate in abortions unless a practitioner, in writing, opts into participating in these services.

ARM 37.106.301

The department proposes to amend this rule to incorporate, for purposes of the rules amended in this rulemaking, the relevant definitions from HB 303, codified at 50-4-1101, MCA. The definitions in HB 303 provide important context and scope to the proposed requirements.

The department proposes to not incorporate the definition of "health care institution" in the amendments. "Health care institution" would be excluded because while the department licenses and regulates some of the facility types listed within the definition found at 50-4-1101, MCA, the department does not have authority with

respect to other entities listed in the definition of "health care institution." The department is not authorized to license and regulate medical centers, physician organizations, professional associations, private physicians' offices, pharmacies, medical school, nursing schools, or other medical training facilities. Of the types of medical institutions listed, the department clearly has authority to regulate public or private hospitals, outpatient centers for primary care, outpatient centers for surgical services, and long-term care facilities. In addition, the definition of "health care institution" includes the catchall "any other entity or location in which health care services are performed." This seems to align fairly well with the definition of "health care facility," which is defined as "all or a portion of an institution, building, or agency, private or public, excluding federal facilities, whether organized for profit or not, that is used, operated, or designed to provide health services, medical treatment, or nursing, rehabilitative, or preventive care to any individual." See 50-5-101(20)(a), MCA. Accordingly, the department proposes to use "health care facility" in place of "health care institution" since that term would seem to encompass all of the types of "health care institutions" over which the department has regulatory authority. The department specifically asks for comment on this approach.

ARM 37.106.310

The department proposes to amend ARM 37.106.310 to explain that the department will not (1) require health care facilities to participate in health care services contrary to their conscience, (2) discriminate against health care facilities for exercising conscience, (3) deny health care facilities any privileges, immunities, or public benefits based on their exercise of conscience, or (4) discriminate against health care facilities for exercising whistleblower rights with respect to violations of conscience rights. The department further proposes that a health care facility can establish a conscience claim by reference to its governing documents. These proposed provisions would implement the applicable provisions in 50-4-1102, 50-4-1104, 50-4-1105, and 50-20-111, MCA.

ARM 37.106.330

The department proposes amendment to this rule to require a biannual review of policies and procedures for all health care facilities, to require that all health care facilities develop policies and procedures that require the facility to not discriminate against practitioners who exercise their First Amendment free speech rights, and to require hospitals, critical access hospitals, rural emergency hospitals, and other health care facilities that perform abortions to develop a policy that does not require medical practitioners to participate in abortions unless a practitioner, in writing, opts into participating in these services.

The department proposes to change the frequency of the required review of policies and procedures from every year to every other year because the department has determined that that provides sufficient frequency to ensure that policies and procedures remain up to date.

The department proposes to require health care facilities to develop policies and procedures on the exercise of conscience by medical practitioners to help ensure

compliance with the provisions of HB 303 that are applicable to the health care facilities that the department regulates. In that regard, and consistent with the requirements of HB 303, the department proposes certain specific topics to be included in such policies and procedures. In addition, so that medical practitioners understand their conscience rights – and the management of health care facilities understand their obligations with respect to the exercise of conscience by their staff – the department proposes to require policies and procedures on training on such rights and obligations. Finally, in order to protect the privacy of medical practitioners, the department proposes to require policies and procedures on maintaining the confidentiality of information on the exercise of conscience by medical practitioners.

The department proposes to specify which health care facilities are required to have policies around abortion services as not all health care facilities as defined in 50-5-101, MCA, provide abortion services. The department identified the types of facilities that may provide abortions, but welcomes comments on other providers that could provide abortion services, and would therefore would be required a develop and implement such a policy.

Fiscal Impact

This proposed rule amendments have no fiscal impact.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Bailey Yuhas, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail hhsadminrules@mt.gov, and must be received no later than 5:00 p.m., August 23, 2024.

6. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above.

8. An electronic copy of this notice is available on the department's web site at <https://dphhs.mt.gov/LegalResources/administrativerules>, or through the Secretary of State's web site at rules.mt.gov.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was notified by email on April 24, 2024.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

11. Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

/s/ Gregory Henderson
Gregory Henderson
Rule Reviewer

/s/ Charles T. Brereton
Charles T. Brereton, Director
Department of Public Health and Human
Services

Certified to the Secretary of State July 16, 2024.