

# Florida Repeals Significant Portions Of Certificate Of Need Law

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On June 26, 2019, Governor DeSantis approved HB 21, repealing significant portions of Florida's long-standing certificate of need (CON) program. The new law will eliminate the CON requirement for general hospitals, complex medical rehabilitation beds and tertiary hospital services, and this repeal will remove major regulatory barriers to commencing or expanding many health care services in Florida.

## In Depth

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On June 26, 2019, Governor DeSantis approved HB 21, repealing significant portions of Florida's long-standing certificate of need (CON) program. Beginning July 1, 2019, the new law will eliminate the CON requirement for general hospitals, complex medical rehabilitation beds and tertiary hospital services. CON requirements for specialty hospitals will sunset two years later, on July 1, 2021.

This repeal will remove major regulatory barriers to commencing or expanding many health care services in Florida, which proponents believe will lead to increased competition and decreased costs.

## Background of Florida's Certificate of Need Law

Florida's CON program, administered by the Agency for Health Care Administration (AHCA), requires operators to obtain prior approval to construct or expand certain health care facilities, offer new services or purchase equipment in excess of a certain threshold. AHCA has historically granted approvals based on a determination of need in a geographic area known as the "fixed need pool," which required health care facilities to demonstrate that there was an unmet need for their facility or expanded services as a prerequisite to obtaining a license to operate in the area.

The 50-year old CON program applied to facilities including hospitals, nursing homes, hospice centers and intermediate care facilities for the developmentally disabled. It requires three different levels of review, depending on the type of facility and services provided: full, expedited and exempt.

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Under the current CON law, AHCA has only approved 16 of the 32 CON applications submitted from 2014 to 2018.

In 2018, the Department of Health and Human Services issued a report, *Reforming America's Health System through Choice and Competition*. In this report, the federal government encouraged state action to repeal CON laws stating that these laws restricted patient choice and are a significant cause of escalating health care costs. As of May 2019, twelve states (California, Colorado, Idaho, Kansas, New Hampshire, New Mexico, North Dakota, Pennsylvania, South Dakota, Texas, Utah and Wyoming) do not have a CON requirement and four states (Arizona, Minnesota, Indiana and Wisconsin) have a limited CON program for certain health care facilities and services.

With the approval of HB 21, Florida will become the fifth state with a limited CON program, requiring review for only certain facilities such as nursing homes and hospice centers.

## **Repeal of Florida's Certificate of Need Requirement**

Under the new Florida law, beginning July 1, 2019, general hospitals, complex medical rehabilitation beds and "tertiary hospital services," including neonatal intensive care units and organ transplant centers (collectively, the Non-Restricted Facilities) will no longer be required to receive CON approval prior to opening new facilities or expanding their services. Therefore, starting July 1, anyone seeking to open a new, or expand services at an existing Non-Restricted Facility may do so subject only to AHCA's licensure requirements. Those seeking to establish, or expand services at a Non-Restricted Facility will no longer need to demonstrate that the new facility or additional services fulfill an unmet need in the area. Further, this repeal will also eliminate the opportunity for established providers to oppose any new facilities or services that may interfere or compete with their current business.

"Specialty hospitals" will become Non-Restricted Facilities two years later, on July 1, 2021. Fla. Stat. § 395.002 defines "specialty hospitals" as any "hospital" (as defined under Fla Stat. § 395.002 (12)) that "regularly makes available either:

1. The range of medical services offered by general hospitals, but restricted to a defined age or gender group of the population;
2. A restricted range of services appropriate to the diagnosis, case, and treatment of patients with specific categories of medical or psychiatric illnesses or disorders; or
3. Intensive residential treatment programs for children and adolescents as defined in [Fla. Stat. § 395.002 (15)]."

HB 21 does not repeal the CON requirements for nursing homes, skilled nursing facilities, hospice programs and intermediate care facilities (Restricted Facilities). Those seeking to establish, or expand services provided at Restricted Facilities will continue to be subject to the CON burdens, including required demonstration of an unmet need, and the ability of competitors in the marketplace to oppose their plans.

Another key aspect of HB 21 includes requiring the Office of Program Policy Analysis and Government Accountability to study and make recommendations to the legislature for licensure standards for tertiary hospital services by November 1, 2019, which may alter licensing requirements for such facilities in the future.

## Key Takeaways

General hospitals, complex medical rehabilitation beds and providers of tertiary services will be free of the CON requirement beginning in July 1, 2019. Specialty hospitals will also no longer be subject to the CON requirement starting July 1, 2021.

Parties seeking to establish, or expand services at nursing homes, skilled nursing facilities, hospice programs and intermediate care facilities for the developmentally disabled will still require a CON.

The CON landscape is shifting in many states across the country. Dealmakers, health care facility operators and providers should continue to monitor CON laws in other states such as Alaska, Georgia, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Vermont and Washington, as these states have introduced or passed similar bills to repeal or reform CON requirements in 2019.

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