Tennessee Makes Major Changes to CON Law

Tennessee healthcare providers will soon have a very different certificate of need (CON) law to consider as they plan new facilities and services. Tennessee’s legislature and the governor recently enacted Public Chapter 557, which codifies the new Health Services and Planning Act of 2021. Effective October 1, 2021, the act changes the substantive requirements for CON approval, as well as the process an applicant must traverse to obtain a CON. The law also requires the state’s Health Services and Development Agency (HSDA), which oversees the CON process, to submit a plan to the legislature by January 1, 2023, to consolidate the HSDA and the state’s health facility licensing agency into a new independent “Health Facilities Commission.” A summary of these changes by healthcare facility and services is available here.

Tennessee Health Services and Planning Act of 2021

Substantive Changes

Tennessee most recently revised its CON law in 2016. Effective October 1, 2021, the
act enacts several additional changes to the state’s CON criteria and impacted providers and services.

**General Criteria for Approving a CON**

For more than a decade, the HSDA has granted a CON so long as the project met four criteria: need, orderly development, economic feasibility, and adequate quality. The act reframes this requirement to state that a CON will not be granted unless three modified criteria are met: the action proposed in the application must be necessary to provide needed healthcare in the area to be served; the applicant must provide healthcare services that meet appropriate quality standards; and “the effects attributed to competition or duplication [must] be positive for the consumers.”

**Mental Health Hospitals and Psychiatric Services**

The act deletes mental health hospitals and the initiation of psychiatric services from the definitions of covered “health care institution” and “health care services” in the relevant statutes, effectively removing all mental health services from the CON law’s ambit. As a result, obtaining a CON is no longer required to establish a mental health hospital or other facility to provide psychiatric services, nor to initiate psychiatric services at an established provider.

**Nursing Homes**

The act also contains a significant change for nursing home projects subject to the CON law. The act reinstates the so-called “10 Bed, 10 Percent Rule,” which permits a nursing home in Tennessee to increase its total number of licensed beds by the lesser of 10 beds or 10% of its licensed capacity without obtaining a CON. The provision had been suspended for several years as part of the state moratorium on new nursing home beds, preventing facilities from changing their bed complement at all. To avail itself of the provision, a nursing home must request the bed increase in writing from the HSDA prior to submitting its request to the Board for Licensing Health Care Facilities to modify its license. The 10 bed or 10% increase cannot be requested within one year after a facility has new beds initially licensed, and a facility may only take advantage of the provision once every three years.

In addition, the legislation deletes the formula for calculating the need for new nursing home beds from the CON statute. However, the corresponding criteria for nursing home projects in the state’s Guidelines for Growth remain in place. The HSDA will continue to revise these guidelines periodically.

**Closed Hospitals**

The act makes it easier to reopen a closed hospital in certain circumstances, as well. Under the new law, a provider seeking to reopen a closed hospital in a rural or distressed county may do so without applying for CON so long as the hospital operated within the previous 15 years. The provision shortens the timeline and reduces the burdens on such a hospital seeking to revive its license.
Economically Distressed Eligible Counties

In addition to the hospital revival provision, the new law provides that a CON is not required for any action that would otherwise require a CON in counties having no actively licensed hospital that are designated as “distressed eligible” by the state Department of Economic and Community Development as of January 1, 2021.

Relocation of Existing Health Care Facilities

The act delegates significant authority to the HSDA’s executive director when providers wish to relocate their facilities. The current law provides that a CON is required to relocate an existing facility. Under the new law, the executive director may issue an exemption from the CON requirement to relocate a healthcare facility if (1) at least 75% of the patients to be served following relocation are reasonably expected to reside in the same zip codes as the facility’s existing patient base and (2) relocation would not reduce access to consumers, particularly individuals who live in underserved communities, are uninsured or underinsured, receive TennCare or other Medicaid benefits, are women and/or members of racial or ethnic minorities, or are low income. The new law also provides that relocation of the principal office of a home health agency or hospice within its licensed service area does not require CON approval.

“Use It or Lose It” Provision

The act also adds new language intended to ensure that any CONs are implemented once they are obtained. The legislation provides that a CON will become void “if the actions it authorizes have not been performed for a continuous period of one year after its implementation.” For home care organizations, this provision applies to each county in which they are licensed to operate. The provision permits the HSDA to revoke a CON unilaterally. CON recipients are not entitled to a hearing prior to revocation, and once a CON or certain activity becomes void, other state departments cannot issue or renew licenses for that facility or activity. The provision does not apply to healthcare institutions’ beds that have been issued a license, regardless of whether that license is active or inactive.

The act also authorizes the HSDA executive director to issue temporary exemptions to the provision. In order to be considered for an exemption, CON recipients must submit a written request stating sufficient cause for ceasing the activity authorized by the CON and a plan for resuming the activity in the future.

Home Health and Hospice (Home Care Agencies)

The new law relaxes some of the requirements to establish new home care agencies (i.e., home health agencies and hospices). The legislation provides that a CON is no longer required to establish the following limited-purpose agencies: a home health agency to provide services under the federal Energy Employees Occupational Illness Compensation Program Act of 2000 (EEOICPA), which is overseen by the U.S. Department of Labor; a home health agency to provide pediatric home care services; or a home care organization or residential hospice to provide hospice services to
patients under the care of a healthcare research institution.

Any license issued by the Tennessee Department of Health for such providers must be limited to the provision of those particular services. Additionally, any home care agency providing services without a CON must be accredited by the Joint Commission, the Community Health Accreditation Partner, or the Accreditation Commission for Health Care and submit proof of such accreditation to the HSDA within two years of the initiation of service or face licensure discipline.

**Hospital-Operated Nonresidential Substitution-Based Treatment Centers**

Under the new act, if a treatment center is (or will be) located on the same campus as a licensed, operating mental health and substance-abuse-related hospital, a CON is not required to initiate treatment or establish a facility.

**PET and MRI Services in Urban Counties**

Public Chapter 557 contains several provisions relaxing CON requirements regarding the establishment of institutions and rendering of services in urban counties with higher populations. Tennessee’s 2016 revision to the state CON law set a population threshold of 250,000 for several provisions; the new law lowers the threshold to 175,000. Consequently, some CON requirements will be loosened for Davidson, Hamilton, Knox, Rutherford, Shelby, and Williamson counties. Among other provisions, providers in these counties will no longer be required to obtain CON approval prior to initiating positron emission tomography (PET) services, provided they receive accreditation from the American College of Radiology or the Joint Commission in the modalities provided by that facility within two (2) years of the date of licensure. Additionally, providers in these counties will not be required to obtain a CON for initiation of magnetic resonance imaging (MRI) services for adult patients. A CON will still be required for initiation of pediatric MRI services. Rural counties with populations lower than 175,000 will still be required to obtain a CON before performing these activities.

**Medical Equipment**

Under the new law, providers will no longer need to obtain the HSDA’s approval to replace or relocate medical equipment that originally required a CON.

**Procedural Changes**

In addition to changing many of the substantive requirements for CON approval, the act also streamlines the CON process and reduces the burden on providers to comply with various requirements.

**Independent Review**

The act changes the review process for CON applications. Currently, CON applications are subject to a two-agency review process: The HSDA reviews an application and declares it complete, then sends it to the appropriate licensing
agency for evaluation. Under the new process enacted in the legislation, the HSDA will conduct the entire review of the CON application. The act dictates that the HSDA may not deem a CON application complete until the agency has overseen an independent review and verification of all information submitted to the agency throughout the application process. The independent review will verify factors such as the number of beds available within a region, occupancy rates, wait list information, regional demographics, and the number of procedures performed.

**Opposition to CON Applications Restricted**

Currently, anyone can oppose a CON application. The legislature made significant changes in the act to restrict who can oppose a CON. Under the new guidelines, a healthcare institution may oppose a CON application only if it is located within a 35-mile radius of the proposed facility or project set forth in the application. If the action opposed is the establishment of a home care organization, the modification of a CON to a home care organization, or the addition of counties to the licensed service area of an existing home care organization, the healthcare institution opposing the action must have served patients in at least one of the counties in the applicant’s proposed service area within the 730 days preceding the filing date of the CON application.

Furthermore, any healthcare institution that wishes to oppose a CON must submit a written objection with the HSDA specifying why the agency should not grant the CON. The healthcare institution also must serve a copy of that objection to a contact person for the CON applicant at least 15 days before the agency meeting at which the application will be considered. Both healthcare institutions and individuals, acting in their capacity as private citizens, may appear in person before the agency to express their opposition to a CON application.

**Changes in Ownership or Control**

The act removes a long-standing requirement for a provider to notify the HSDA of ownership changes occurring within two years of initial licensure of a new healthcare institution. The new legislation also creates a process to allow the HSDA to permit CON transfers for as-yet-unimplemented CONs where the agency determines the new CON holder would provide healthcare that meets appropriate quality standards; the transfer would not reduce access to consumers, especially those in underserved communities, those who are uninsured or underinsured, women and racial and ethnic minorities, TennCare or Medicaid recipients, and low-income groups; and the agency approves the transfer.

**Emergency CON Process**

Public Chapter 557 also codifies existing regulatory provisions that authorize the HSDA to issue a temporary emergency CON. An emergency CON is valid for no more than 120 days unless an emergency CON applicant also applies for the same CON under standard procedures. In that case, an extension beyond the 120-day period may be granted.

An emergency CON will only be issued if an unforeseen event necessitates action of
a type requiring a CON and public health, safety, or welfare would be unavoidably jeopardized by compliance with the standard procedure. After a CON applicant takes the required step of publishing its notice of application in a newspaper of general circulation, an emergency CON can be issued at the next HSDA meeting or, under circumstances in which an event rendered the applicant’s facility, equipment, or service inoperable, the agency’s chair or vice-chair can act immediately to consider an emergency CON application.

**Reporting Provisions**

The new law requires providers of cardiac catheterization, open heart surgery, organ transplants, burn unit operations, neonatal intensive care unit operations, home health services, or hospice services to file an annual report with HSDA that includes utilization data sorted by payment source and patient zip codes.

**Schedule of Fees**

The legislature has made a policy decision that those who benefit from a CON should also fund the CON process. Public Chapter 557 eliminates the existing per-application fee structure in favor of a new annual fee process. The law establishes new annual fees for all licensed providers by category. Thus, once the law is effective, hospitals with more than 200 beds will be charged an annual fee of $5,000; ambulatory surgical treatment centers will be charged $2,000 per year; and nursing homes with more than 100 beds will be charged $2,500 per year.

**The Future of Healthcare Facility Regulation in Tennessee**

The changes coming in October are only the beginning. After years of discussion among government representatives and industry stakeholders on how to make healthcare services and facility licensure more efficient, the act directs the HSDA executive director to create a plan that will ultimately combine the functions of licensure (currently under the Board for Licensing Health Care Facilities) and CON approval (under the HSDA) into a new, independent Health Facilities Commission. The provision reflects the legislature’s longstanding goal to move Tennessee toward a single agency overseeing healthcare facilities and services from their initial planning and creation to ongoing operation. The legislature has also voiced its intention to continue to use quality standards as a means to regulate and ensure accountability for facilities and services. While the executive director’s proposed plan is not due until January 1, 2023, important conversations are already taking place regarding the new Health Facilities Commission.

Overall, the new act reflects the legislature’s efforts to limit Tennessee’s CON law to only those facilities and services where attention is most needed and to continue to move toward healthcare oversight that emphasizes competition rather than regulation. The act simultaneously relaxes CON requirements for some facilities and services while retaining or even tightening requirements on others. Institutions located in highly populated or economically distressed counties and home care organizations will benefit from the legislation, as will providers having more “routine” CON matters, such as replacement facilities or small increases in bed
counts. Mental health services are significantly impacted, as they are no longer subject to CON requirements. However, the legislation is limited to provisions impacting the CON process; providers must still ensure they have met all other licensure requirements imposed by state and federal agencies.

© 2021 Bradley Arant Boult Cummings LLP

Source URL: https://www.natlawreview.com/article/tennessee-makes-major-changes-to-con-law