

Certificate of Need – *Enforcing Healthcare Monopolies*

One of the ‘unseen hands’ controlling healthcare availability in Washington State is a little-known regulatory process, *Certificate of Need* (CON). Administered by the Washington Department of Health, CON is a regulatory process that provides an exemption from normal antitrust regulations, granting a limited number of service providers exclusive rights to practice within a region.

Applicants for certificates endure a complex, expensive process that examines their financial viability and ability to provide services. During the process they must also agree to meet specific conditions, including service quality, charity care and addressing the needs of underserved communities - all worthwhile goals. But once awarded a certificate they can expect to have it renewed over and over regardless of whether these conditions are met. The result is that a limited number of providers dominate services that are subject to the CON process – and in Washington, most are religiously affiliated, restricting access to medical services that are subject to religious doctrine. (See “[Religious Doctrine May Be Restricting Your Healthcare Choices](#)” for details on the Ethical and Religious Directives, one form of religious restriction to healthcare services.)

What is Certificate of Need? How does it affect my provider choices?

Certificate of Need programs were created by Congress in 1964 with the goal of ensuring efficient use of resources. The originators of CON programs believed that they would control costs by eliminating unnecessary treatment and equipment costs and ensure financial stability by controlling the number of healthcare providers. The efficiency gains expected from these limited monopolies were thought to result in greater community access to care and increases in charity care.

After disappointing results, the federal government stopped encouraging Certificate of Need programs in 1987, and an increasing number of states have reduced or removed CON regulations. Currently, Certificate of Need programs are present in 35 states plus the District of Columbia, and 12 states have rescinded CON laws.

Some of the impacts of Certificate of Need in Washington State:

- Costly application processes and the requirement for legal representation have blocked small firms from CON success, ensuring a limited number of larger providers dominate the state
- With lax enforcement of CON provisions, charity care has fallen below the state’s legal minimum
- Medical costs have risen
- Providers have little incentive for innovation and can’t react quickly to changes in the market

CON processes are in place for 17 services in Washington, including hospitals, hospice care, specialty surgical centers, nursery and inpatient pediatric care, and intensive obstetric care. Some changes to existing medical services might also trigger a CON review, including:

- The sale, purchase or lease of all or part of an existing hospital, regardless of profit/non-profit status
- Increases in the number of licensed beds at a hospital, nursing home or hospice care center

Recent examples of Washington hospital system mergers – Swedish and Providence in 2012 and Virginia Mason and CHI Franciscan in 2021 – have demonstrated that public needs and testimony have had no effect on the decisions made by the Department of Health during the CON process. As an example, Providence Hospice has retained dominance in most counties to provide Medicare Eligible hospice services despite their history of ignoring advance directives and opposition to Washington’s Death with Dignity laws.

Why are healthcare services exempt from antitrust regulations?

Besides CON, innovation in Washington’s healthcare marketplace is further constrained by a law known as the **Certificate of Public Advantage** (COPA). Created in the 1990s, COPA laws were originally enacted in approximately 19 states. They exempt healthcare mergers from the usual antitrust reviews, allowing businesses to combine in ways that might otherwise be prohibited by antitrust laws. The Federal Trade Commission now recommends such laws be removed as they have instead concentrated medical systems within a few national corporations.

Attempts to review or remove CON and COPA laws

During the 2023-2024 Washington legislative session, House Bill 2128 called for a review of the Certificate of Need process. It passed the House and made progress toward passage in the Senate but was instead converted at the end of the session to a budget item within the Governor’s Office and the task of reviewing CON was left to the Department of Health. Not surprisingly, the DOH review ignored requests from health professionals and members of the public to reconsider CON itself, claiming that it was not within the charter of the Governor’s

request. Preliminary recommendations from the commission are to expand Certificate of Need into additional areas of medical service. (The final report from this review is due in the summer of 2025.)

Other states have been successful in reducing or eliminating CON regulations. During the COVID pandemic, Oregon found that it needed to streamline its CON rules to resolve inequities in delivering medical services to rural communities, and all CON regulations have been removed in California. Indiana Senator Ed Charbonneau, one of the primary architects of COPA, introduced a bill to remove the law due to its negative impact on competition and patient care.

Alternatives to Certificate of Need Programs

While some oversight may be needed to balance the needs of communities and maintain the viability of providers, it is clear that the CON process is not serving the public well. To address the issues with Certificate of Need programs, other states have considered several options:

- Reduce or remove regulations
- Involve the community in the planning process for better alignment with local needs
- Establish performance metrics for service quality and patient satisfaction
- Provide greater transparency in the review process to ensure fairness and accountability
- Streamline the process to focus on high-cost or specialized services

A program no longer needed

It's clear that true choice of medical providers – and the services they offer – can only be achieved within a flexible regulatory process that puts the needs of the community first. Certificate of Need has outlived its purposes, and better choices exist to balance business viability with universal access to comprehensive health care.

Additional References

Certificate-of-Need Laws: How They Affect Healthcare Access, Quality, and Cost

Mecatus Center, George Mason University

<https://www.mercatus.org/economic-insights/features/certificate-need-laws-how-they-affect-healthcare-access-quality-and-cost>



Health Care Certificate-of-Need (CON) Laws: Policy or Politics?

National Institute for Health Care Reform

<https://www.nihcr.org/analysis/improving-care-delivery/prevention-improving-health/con-laws/>



How CON Laws Affect Healthcare Access, Quality, and Cost in Washington

Mecatus Center, George Mason University

<https://www.mercatus.org/publication/washington-and-certificate-need-programs-2020>



Certificates of Public Advantage (COPAs)

Federal Trade Commission

<https://www.ftc.gov/news-events/features/certificates-public-advantage-copas>



About Save Secular Healthcare Washington

Save Secular Healthcare Washington was formed in 2019 to fight the merger of Virginia Mason and CHI Health and continues its work to expand access to affordable, comprehensive, and equitable healthcare while increasing oversight and accountability for all Washington healthcare systems. Our advocacy has helped to move public and legislative discussion towards a better understanding of the harm caused by limits to critical medical services for reasons that are not based on medical fact.

More information: savesecularhealthcare@gmail.com or <https://sshwa.org/>