

## Legal Sidebar

# Implications of Restricting the Use of Conversion Therapy for Religious Providers

12/07/2015

---

Illinois recently enacted [legislation](#) banning the practice commonly known as “gay conversion therapy” for minors, and also restricted the practice more generally by regulating the advertisement of such therapy as misleading representations under consumer law. Regulation of conversion therapy, which often is referred to as SOCE for sexual orientation change efforts, has been undertaken at the state level thus far, with four states ([California](#), [Illinois](#), [New Jersey](#), and [Oregon](#)) and the [District of Columbia](#) banning its use on minors. At the federal level, the Obama Administration has [stated its support](#) for banning the practice for minors and [legislation](#) has been introduced that would regulate conversion therapy as a matter of unfair and deceptive trade practices. Some therapists have objected to conversion therapy restrictions as interfering with their religious exercise, believing that they have a religious obligation to assist someone with conversion from same-sex attractions.

### State and Federal Regulation of Conversion Therapy

States have generally implemented SOCE bans by regulating medical professionals under standards of medical conduct. However, Illinois adopted additional restrictions that apply more broadly. In addition to banning the practice for individuals under 18 years old, [the law](#) prohibits using “any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact in advertising or otherwise that represents homosexuality as a mental disease, disorder, or illness, with intent that others rely upon the concealment, suppression, or omission of such material fact.”

[H.R. 2450, the Therapeutic Fraud Prevention Act](#), would apply a somewhat similar approach. H.R. 2450 would ban any individual from providing conversion therapy in exchange for monetary compensation. It would also prohibit advertising conversion therapy services if the advertisement claims to change the participant’s sexual orientation or gender identity; claims to reduce or eliminate sexual or romantic attractions to the same gender; or represents that such therapy poses no harm or risk to the participant. Violation of any of these acts would constitute an [unfair or deceptive act or practice under the Federal Trade Commission Act](#).

### Implications for Religious Providers

A number of therapists who provide conversion therapy do so because of their religious beliefs. Accordingly, bans on such therapy have raised concerns about interfering with religious freedom. Bans that are imposed as a matter of licensing and regulation of medical professionals do not appear to impact individuals providing non-medical spiritual counseling on the topic of sexual orientation. As the [U.S. Court of Appeals for the 9<sup>th</sup> Circuit has made clear](#), these bans do not affect the ability of spiritual counselors or even mental health professionals to “discuss and recommend treatment and to express their views on any topic.” The bans related to conversion therapy for minors instead apply only to the provision of medical treatment itself. Bans based on regulation of unfair and deceptive trade practices apply more broadly and may have implications for practitioners who view their religious beliefs as guiding their professional conduct.

Some therapists who offer conversion therapy have religious beliefs that same-sex relationships violate religious norms

and have challenged state restrictions as violating their religious exercise and free speech rights. However, courts have upheld state bans on the use of conversion therapy with minors in challenges to the New Jersey and California laws under the First Amendment, as discussed in a [previous Sidebar](#). Finding a compelling government interest in preventing the use of conversion therapy on minors, federal appellate courts have held that the restrictions, as neutral laws of general applicability, satisfy the requirements of the Free Exercise Clause, and also satisfy even the strict scrutiny required under the Free Speech Clause. [One court reasoned](#) that a therapist's counseling could be limited under the state's restrictions because there was "no credible evidence that SOCE counseling is effective."

For a therapist to claim that a federal law violates his or her exercise of religious beliefs, a therapist must satisfy the elements of the [Religious Freedom Restoration Act](#) (RFRA). Prior to 2014, for-profit businesses had not been recognized as eligible for protection under RFRA. Individuals and charitable organizations had invoked protection of their religious beliefs when infringed by government action, but not in the context of a for-profit practice. However, the Court's 2014 decision in [Burwell v. Hobby Lobby Stores, Inc.](#) made clear that heightened religious freedom protection may be available to individuals or entities who consider the operation of their for-profit business as a mode of observing their religious obligations. Though the full scope of *Hobby Lobby* is not clear, the Court interpreted RFRA to apply to closely held businesses owned by individuals with sincere religious beliefs.

Thus, if a licensed medical professional, who offers his or her services for profit, believes that his or her religion requires him or her to provide conversion therapy, that provider may allege that H.R. 2450's ban on receiving monetary compensation or advertising the benefits of conversion therapy burdens his or her religious exercise and expression. The potential success of such a claim is unclear. RFRA requires, in part, that the government demonstrate a compelling interest for burdening the free exercise of religion, and, based on the appellate court cases decided so far, courts appear to have recognized such a compelling government interest in protecting citizens from conversion therapy. Early litigation, however, has focused on protecting minors, and the analysis may differ when the recipient of conversion therapy is a consenting adult who believes in conversion therapy.

Posted at 12/07/2015 11:49 AM