POLICY SPOTLIGHT

Certificate-of-Need Laws Limit Access to Healthcare—Repealing Them Reduces Costs and Improves Quality

MATTHEW D. MITCHELL | AUGUST 2021

Certificate-of-need (CON) regulations require healthcare providers to seek permission from state regulators before offering new services, expanding facilities, or investing in new technologies. Though CON laws are intended to restrain costs, increase quality, and improve access for low-income and underserved communities, research shows that such laws increase cost, degrade quality, and limit access—and that these negative effects may be cumulative. In states that require CONs for four or more services, postsurgery complications and readmission rates following heart attacks and heart failure are higher and patient satisfaction levels lower. Yet comprehensive CON programs remain in 35 states and the District of Columbia. Given the experience of states that have undertaken reform, policymakers wishing to increase patient access to high-quality, lower-cost care—and improve the responsiveness of their healthcare systems in times of crisis—would be well advised to eliminate their entire CON programs.

FULL REPEAL

Fifteen states have either very limited CON programs that apply only to ambulance services or no CON programs at all. However, repeal attempts often stall in the face of opposition from highly organized groups of incumbent providers who benefit from the anticompetitive effects of CON regulation. Successful reforms allow policymakers to cast conspicuous votes for the general interest while giving them some cover as they remove special interest privileges.

PARTIAL REPEAL

Removing CON requirements for specific services or technologies that are widely used or widely seen as important for vulnerable populations can garner political support. Good candidates for repeal include regulations

- that restrict access to facilities used by vulnerable populations, such as drug and alcohol abuse treatment centers, psychiatric care facilities, and intermediate-care facilities for those with intellectual disabilities;
- for care unlikely to be overprescribed, including neonatal intensive care, burn care, and hospice care;
- for low-cost facilities, such as ambulatory surgical centers and home healthcare facilities; and
- for services and technologies that require small investments.

PHASED REPEAL

Rather than undertaking repeal in one bill, legislators can build buy-in by eliminating CON laws in stages and over time. Tools at their disposal include automatic sunsets, temporary suspensions as a way of testing the effects of removing a CON requirement, and gradual increases in approval rates of CON applications.

REPEAL CONTINGENT ON THE ACTIONS OF OTHERS

States can make CON repeal contingent on the actions of neighboring states. This approach may be viable, given the fact that both patients and providers are influenced by neighboring states' policies. As a result, patients may seek care in neighboring states, and providers may set up new services across state lines to avoid regulatory hurdles.

ADMINISTRATIVE RELIEF

CON application processes are expensive and time consuming. Even if states keep CON laws on the books, they can alleviate the administrative burden of applying for a CON through the following:

- *Reduce application fees.* Flat fees are as high as $300,000 in the District of Columbia, and fees can be especially high in states such as Hawaii that charge a percentage of project costs.
- *Simplify application and reporting requirements.* Illinois's application is 78 pages long; in Virginia, one radiology center spent five years and $175,000 applying for a CON.

MODIFICATION OF CRITERIA

States can modify the criteria they use to evaluate whether a service is needed in the community. For instance, they can eliminate the nonduplication criterion (which hinders competition between providers) and the utilization criterion (which does not accurately measure the need). They can also narrow the geographic scope of analysis so that needs are assessed on a local basis. Furthermore, states can increase transparency by disclosing information about applications (e.g., approval rates, number of applications opposed, reasons for denial), applicants' financial ties to political campaigns and members of the CON board, and potential conflicts of interest among board members. Finally, they could follow the lead of Indiana, Louisiana, Michigan, Nebraska, and New York, which do not allow competitors to have a say in the CON approval process.

FURTHER READING

Matthew D. Mitchell, Elise Amez-Droz, and Anna K. Parsons, "Phasing Out Certificate-of-Need Laws: A Menu of Options" (Mercatus Policy Brief, Mercatus Center at George Mason University, Arlington, VA, February 2020).

Matthew D. Mitchell, "Certificate-of-Need Laws: Are They Achieving Their Goals?" (Mercatus on Policy, Mercatus Center at George Mason University, Arlington, VA, April 2017).

Matthew D. Mitchell, Anne Philpot, and Jessica McBirney, "The State of Certificate-Of-Need Laws in 2020," February 19, 202, https://www.mercatus.org/publications/healthcare/con-laws-2020-about-update.

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