



April 27, 2020

Governor John Carney  
Legislative Hall  
Dover, DE 19901

Via email: [jcarney@state.de.us](mailto:jcarney@state.de.us) and USPS

Dear Governor Carney,

Pacific Legal Foundation (PLF) is writing to request that you suspend Delaware's Certificate of Need (CON) law to allow medical personnel to respond quickly to the fast-changing COVID-19 crisis. CON laws force healthcare providers prove that their services are "needed" before building new facilities or purchasing new medical equipment. Importantly, proving "need" is separate from satisfying health and safety regulations; it is an anti-competitive requirement that prioritizes the economic interests of existing providers over the actual needs of consumers. At least 22 of the 36 states with CON laws have relaxed them, either by suspension or emergency rule, in light of the COVID-19 pandemic.<sup>1</sup> We ask that you do the same.

PLF is the nation's most established nonprofit legal foundation devoted to eliminating unnecessary licensure restrictions, including Certificate of Need laws. In addition to testifying before state legislatures on licensing matters like CON requirements, PLF has brought several lawsuits challenging CON programs, including a pending lawsuit in Kentucky on behalf of an ambulance business. Past PLF lawsuits have resulted in the invalidation or repeal of CON laws in the transportation industry across the country.

CON laws were intended to limit investment in healthcare infrastructure to what's "needed," but in practice they are an unnecessary barrier to potentially life-saving services. Depending on the state, CON laws may cover providers who seek to build birthing centers, ambulance companies who wish to buy an additional truck, or even hospitals who simply seek to add new beds. If the government deems the existing providers or equipment adequate, it will deny an applicant a CON.

Under most CON laws, existing providers have the right to protest and oppose any application for a CON. Evidence from PLF lawsuits shows that whether an applicant is able to secure a Certificate often depends on whether an existing business objects to their application.<sup>2</sup> Commentators, and even courts, have therefore called CON laws a "Competitor's Veto."

Decades of research show that CON laws artificially restrict supply and drive up costs. The Mercatus Center found that states with CON laws have 30 percent fewer total hospitals per 100,000 residents, higher overall healthcare prices, and lower levels of care.<sup>3</sup> Journalists have reported on

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<sup>1</sup> <https://pacificlegal.org/certificate-of-need-laws-covid-19/>.

<sup>2</sup> <https://bit.ly/34Hgg00>.

<sup>3</sup> <https://www.mercatus.org/publications/corporate-welfare/certificate-need-laws>.

instances of CON laws leading to preventable deaths, including the death of an infant due to the absence of a nearby Neonatal Intensive Care Unit (NICU).<sup>4</sup> The Department of Health, Department of Justice, and Federal Trade Commission have all warned that CON laws act as an anti-competitive barrier to new medical products and services and have therefore advocated for permanent repeal.<sup>5</sup>

Forcing providers to prove their services are needed puts lives in danger. When COVID-19 reached its peak in New York City, a lack of providers and lagging wait times forced overstretched ambulance companies to choose between life and death for some patients.<sup>6</sup> Governor Cuomo eventually suspended most of the state's CON laws to allow medical providers to quickly start up and expand, but by then, there was already a severe shortage of hospital beds, equipment, and ambulances. Policymakers should not wait until a crisis exists to allow healthcare providers the freedom to respond rapidly to changing demand.

CON laws are anti-competitive and unfair barriers to earning a living under any circumstances, but they are especially pernicious in the middle of a pandemic when providers must be free to adapt quickly to unpredictable circumstances. While the law should also be permanently repealed, a temporary suspension during the COVID-19 crisis to protect Delawareans' well-being is imperative. After the emergency passes, PLF will continue to fight to end CON requirements through litigation or legislation. We hope to work with your administration in that effort.

Sincerely,



Anastasia P. Boden  
Senior Attorney



Mollie R. Williams  
Attorney

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<sup>4</sup> <https://reason.com/2017/01/25/virginia-certificate-of-need-hospital/>;  
<https://www.wymt.com/content/news/Womans-mom-dies-says-she-waited-hours-for-ambulance-430443193.html>.

<sup>5</sup> <https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf>;  
<https://www.hhs.gov/about/news/2018/12/03/reforming-americas-healthcare-system-through-choice-and-competition.html>; <https://www.ftc.gov/public-statements/2015/12/certificate-need-laws-prescription-higher-costs>.

<sup>6</sup> <https://www.nytimes.com/2020/03/28/nyregion/nyc-coronavirus-ems.html>.