September 23, 2021

SB 8, the “Heartbeat Bill” Guidance: Part 2

The following guidance does not constitute legal advice. If you have specific legal questions, we recommend you reach out to your liability insurance or your own legal counsel.

SB 8 (Hughes/Slawson), AKA the “Heartbeat Bill, passed during the 87th legislative session and went into effect on September 1, 2021. The law bans abortion after six weeks, before many people even know they are pregnant, and allows private citizens to enforce the law by suing someone who performed, “aided,” “abetted,” or intended to aid or abet an abortion in violation of the ban.

Last month we provided guidance to our members on SB 8. We continue to hear from social workers across the state with questions about how the law impacts their daily practice and their clients. NASW/TX is dedicated to providing guidance and information, so we have compiled the following questions and answers addressing some additional issues, based on our understanding and feedback from our legal partners (please also review our earlier guidance).

Note that earlier this month, the U.S. Justice Department filed a lawsuit (which is still pending) seeking an order barring enforcement of the law, arguing that it prevents women from exercising their constitutional rights. This action comes after the U.S. Supreme Court’s 5-4 decision declining to block the legislation. In that ruling, the Court stressed that it was not ruling on the law’s constitutionality and did not intend to limit “procedurally proper challenges” to it.

Questions:

1. What does “aiding and abetting” mean in the context of this law? How is that related to my work as a social worker?

The plain language definition of “aiding and abetting” is to “assist or actively encourage”. There appears to be no authoritative guidance on the application of these terms. Based on the common understanding of the terms, social workers engage in many different activities that could be covered. Because no law like SB 8 has been implemented in other states, we do not know how a social worker’s actions may be interpreted. However, it is the belief of our legal partners that, while activities in counseling, therapy, case management, and medical social work, may not explicitly fall under these terms, a lawsuit could still be
brought against a provider, and ultimately the court is the final arbiter. Discussing reproductive options, referral to abortion services, and more could trigger a lawsuit, even if those activities are not prohibited.

We encourage social workers to continue to have open discussions with clients but be aware that the law may be used as an intimidation tactic to stifle their work. This will not impact all social workers, but for those who do engage in these conversations and activities with clients, we encourage them to remain aware of SB 8 and its implications.

2. If a social worker has a civil action brought against them for “aiding and abetting,” who pays for the legal fees and the statutory damages (at least $10,000) if the party bringing the action wins?

The defendant, or the person being sued, would have to pay both the damages and the legal fees of the plaintiff. Professional liability insurance may or may not cover these amounts, based on the individual policy. Consult with your insurance carrier for specifics and guidance. Regardless of the outcome of the lawsuit, the defendant remains responsible for their own legal fees.

3. What if I talked with a client about their past abortion. Does that make me liable to be sued under SB 8?

Apparently not. Based on its language, the statute does not suggest any liability in connection with a discussion of past abortions, provided that this was not in the context of encouraging a future abortion.

4. What about HIPAA and therapy records? How do I write notes?

We encourage you to use a medical record approach: no details of the conversation should be included; instead make reference to, for instance, the patient discussing life changes and management. Some social workers choose not to include the word abortion or state that they discussed pregnancy termination in notes or on forms for insurance.

5. What can I do to protect my license?

First and foremost, we recommend contacting your liability insurance provider to gather any information they can provide about the type of work you do, your liability coverage, and how they are handling SB 8-related questions. Liability insurance covers legal defense and outcomes from any legal allegations connected to social work practice and delivery of services. How “services” are defined may be different based on your individual insurance policy.

Based on our conversation with one liability coverage provider, their liability insurance is expected to cover SB 8-related litigation; however, this is all speculation, because (to our knowledge) no suit has been filed yet.
6. I own my own practice, what can I do to protect my finances?

Providers who own their practice may want to consider protecting their financial assets by consulting a CPA and/or an attorney, who might advise establishing an LLC or independent business status for their practice.

We are continuing to seek guidance on this issue and will provide updates as we receive them. Abortion is legal in the United States, everyone has a right to discuss health matters with a professional – and this law was drafted to thwart the exercise of those rights. NASW is clear in its position supporting the autonomy of women to make reproductive decisions for themselves (Social Work Speaks has a section on Family Planning). NASW/TX supports the values of social work and the autonomy of our members and their clients and encourages each provider to make the choices that best allow them to respect the dignity and worth of all people.

Take action and sign our petition to support social workers demanding their constitutional rights be upheld, sign and share with others.

If you have any questions about this issue or about our legislative advocacy, please reach out to the NASW/TX Government Relations Director, Alison Mohr Boleware, LMSW at aboleware.naswtx@socialworkers.org.

If you’re a member of NASW, thank you! Your membership helps us have the ability to get legal guidance on important practice and licensure issues like this. If you’re not, then please know that we could use your support as members make that possible. You can always join here to receive the latest updates and join our efforts.

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