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# The Implications of SB8 and Protecting Health Care Professionals Who Provide or Support Abortion

## Health Care Professionals Face a Range of Discrimination in Employment Settings

Health care professionals across the country report hostility and outright discrimination due to their support for abortion access or participation in abortion care. From denying admitting privileges to rescinding job offers to prohibiting health care professionals from speaking out publicly about abortion, employers are unfairly penalizing those who provide or support abortion. With the new draconian Texas abortion ban becoming effective, and other states promising to pass copycat laws, health care professionals need protection against discrimination more than ever. Fortunately, federal law offers some explicit protection for these health care professionals—as the Department of Health and Human Services recently clarified—and some state laws do too, but more protection is needed.

## How Health Care Professionals Face Discrimination for Providing or Supporting Abortion

Discrimination against health care professionals takes many forms, and occurs in all kinds of health care institutions, including public and private hospitals, small and large institutions, religiously affiliated institutions, and secular institutions. For example, one physician was directly threatened by a senior partner of a private ob/gyn practice during a job interview: “If I ever find out you did elective abortion any time in your professional life, you’ll never practice medicine in [this state] again.”<sup>1</sup> In other instances, clinicians who have provided abortions in the past, or who engage in public advocacy around abortion, report having job offers suddenly rescinded once the prospective employers learn of the clinician’s past or ongoing participation in abortion care and advocacy. Health care providers have also been punished for speaking out publicly in support of abortion,<sup>2</sup> or fired for their private views in support of abortion.<sup>3</sup>

## The Implications of Texas Senate Bill 8

On September 1, 2021, a blatantly unconstitutional law in Texas (Senate Bill 8/SB8) went into effect. SB8 bans abortion around six weeks in pregnancy, before most people know they are pregnant. This law also encourages anyone—including anti-abortion activists who have no connection to the pregnant person—to enforce the ban by suing abortion providers and anyone who helps a person obtain an abortion (like a counselor who advised the patient, abortion funds that provide financial support and assistance to people seeking abortion care, or even someone who drives a patient to their appointment). Those who are successful in their lawsuits will collect \$10,000, effectively creating a bounty on abortion providers and those who help pregnant people access care.

The law is designed to end abortion in the state of Texas by intimidating doctors and clinics out of providing abortion care and saddling them with lawsuits that consume their time and resources. It also creates a chilling environment for health care providers, even those who do not directly provide abortion, interfering in the provider-patient relationship and effectively gagging providers from giving their patients full options and information.<sup>4</sup>

The punitive and intimidating nature of the new Texas law creates an environment that could encourage discrimination against health care professionals who are courageous enough to speak out about their support of abortion, or against those who provide abortion consistent with the extremely narrow lawful window SB8 provides.

## Federal Law Protects Abortion Providers from Discrimination

Discrimination based on employees' participation in abortion—or willingness to participate in abortion—has been illegal since 1976 under federal law known as the Church Amendments.<sup>5</sup> The Church Amendments prohibit health care institutions that receive federal funding (including Title X grants, Hill-Burton funds, and reimbursement through Medicaid or Medicare) from discriminating against health care personnel because of their participation in abortion or sterilization, or because of their "religious beliefs or moral convictions respecting" abortion or sterilization.<sup>6</sup> If an individual employee or applicant for employment or training program has faced discrimination, they can file a complaint with the federal Department of Health & Human Services (HHS) Office for Civil Rights (OCR) asking OCR to investigate and to require the institution to come into compliance.

On September 17, 2021, in response to the Texas law, HHS released guidance affirming these protections for health care professionals and reminding personnel that any violations of the Church Amendments should be reported to OCR for enforcement.<sup>7</sup>

## State Laws that Protect Providers from Discrimination

Texas is one of handful of states have their own laws that explicitly protect health care professionals against discrimination based on their participation in abortion.<sup>8</sup> The Texas law forbids discrimination by institutions against employees who are willing to participate in abortion at another facility.<sup>9</sup> It also protects applicants to an educational institution from discrimination based on their attitudes about abortion.<sup>10</sup> This law is enforced by a private civil action against the facility that is alleged to have discriminated against the employee.<sup>11</sup>

## More Protections Are Needed

Although the Church Amendments and select state laws offer important protections, these laws vary widely in the kinds of conduct they protect, and the ways they are enforced. And as Texas demonstrates, hostile states are continuing to target abortion providers and create an environment for more discrimination. Health care professionals need better protections to ensure that their employer will not discriminate against them in the range of circumstances in which abortion care and information is necessary patient care, or when they speak out in support of abortion access.

- <sup>1</sup> Lori Freedman, Uta Landy, Philip Darney, & Jody Steinauer, Obstacles to the Integration of Abortion Into Obstetrics and Gynecology Practice, 42 PERSP. SEXUAL & REPROD. HEALTH 148 (May 2010).
- <sup>2</sup> Erik Eckholm, Doctor, Warned to Be Silent on Abortions, Files Civil Rights Complaint, NY TIMES (May 2, 2016), [https://www.nytimes.com/2016/05/03/us/doctor-warned-to-be-silent-on-abortion-files-civil-rights-complaint.html?\\_r=0](https://www.nytimes.com/2016/05/03/us/doctor-warned-to-be-silent-on-abortion-files-civil-rights-complaint.html?_r=0).
- <sup>3</sup> Olivier Uyttebrouck, Ex-councilor Files Suit Over Dismissal, ALBUQUERQUE JOURNAL (Aug. 6, 2016), <https://www.abqjournal.com/821375/excouncilor-files-suit-over-dismissal.html>.
- <sup>4</sup> Press Release, President Gerald E. Harmon, MD, American Medical Association, AMA statement on SB8 (Sept. 1, 2021), <https://www.ama-assn.org/press-center/ama-statements/ama-statement-texas-sb8>.
- <sup>5</sup> U.S. DEPT. OF HEALTH & HUM. SERVS., GUIDANCE ON NONDISCRIMINATION PROTECTIONS UNDER THE CHURCH AMENDMENTS (Sept. 7, 2021), <https://www.hhs.gov/conscience/conscience-protections/guidance-church-amendments-protections/index.html>.
- <sup>6</sup> Church Amendments, 42 U.S.C. § 300a-7 (amended 2017), <https://www.hhs.gov/sites/default/files/ocr/civilrights/understanding/ConscienceProtect/42usc300a7.pdf>
- <sup>7</sup> Press Release, HHS Secretary Xavier Becerra, HHS Secretary Xavier Becerra Announces Actions to Protect Patients and Providers in Response to Texas' SB 8 (Sept. 17, 2021), <https://www.hhs.gov/about/news/2021/09/17/hhs-secretary-xavier-becerra-announces-actions-protect-patients-and-providers-response-texas-sb.html>.
- <sup>8</sup> Tex. Occ. Code Ann. § 103.002 (West 2021), <https://statutes.capitol.texas.gov/Docs/OC/htm/OC.103.htm>.
- <sup>9</sup> Tex. Occ. Code Ann. § 103.002(b) (West 2021) (providing that “[a] hospital or health care facility may not discriminate against a physician, nurse, staff member, or employee because of the person’s willingness to participate in an abortion procedure at another facility”), <https://statutes.capitol.texas.gov/Docs/OC/htm/OC.103.htm>.
- <sup>10</sup> Tex. Occ. Code Ann. § 103.002(c) (West 2021) (stating that “[a]n educational institution may not discriminate against an applicant for admission or employment as a student, intern, or resident because of the applicant’s attitude concerning abortion”), <https://statutes.capitol.texas.gov/Docs/OC/htm/OC.103.htm>.
- <sup>11</sup> Tex. Occ. Code Ann. § 103.003 (West 2021) (describing remedies under the legislation for “[a] person whose rights under this chapter are violated [and whom] may sue a hospital, health care facility, or educational institution in district court in the county where the hospital, facility, or institution is located for: (1) an injunction against any further violation; (2) appropriate affirmative relief, including admission or reinstatement of employment with back pay plus 10 percent interest; and (3) any other relief necessary to ensure compliance with this chapter”), <https://statutes.capitol.texas.gov/Docs/OC/htm/OC.103.htm>.