

LEGAL ISSUES



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1 JUNE 2020



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Echo Legal Disclaimers

- NOT LEGAL ADVICE
- Meant to be “quick-hitters” on variety of topics
 - Scratch the surface only - issues—too complex for short didactic

Overview

- Discrimination/Civil Rights
- Drug Courts/Criminal Justice
- Social Security Disability
- Family Law/DCS Issues
- Expungement/Specialized Driving Privileges
- Advance Directives
- HIPAA
- DEA Investigations
- IN Atty General/PLA Investigations

Civil Rights Issues

SUD is a protected “disability” under civil rights laws (ADA/FHA). Protects employment and housing.

Two elements:

1. The person is in active treatment AND
2. “not currently engaging in illegal use of drugs”

NOTES:

What “currently” means is unclear.

Employers/landlords (and many others) cannot take adverse actions on the basis of the disability.

Protection provided:

1. Discrimination against adverse treatment because of protected class, including disability
2. Employer has a duty to make reasonable accommodations

Civil Rights Issues

If Individual is engaged in illegal drug use, they are NOT an “individual with a disability.”

This does NOT include a person with a *history* of drug addiction, but is not *currently* using. This person qualify for protection.

An employer MAY prohibit the illegal drug use *and* use of alcohol in the workplace.

An employer MAY test employees for illegal use of drugs.

An employer MAY discharge or deny employment for illegal use of drugs.

An employer MAY require disabled employees to meet the same standards of performance as other employees.

Source: United States Commission on Civil Rights

Civil Rights Issues

Can an employer require disclosure of prescriptions/medical treatment?

- Before job offer? No. Unless it is directly related to job duties.
- After job offer, but before employment starts? Yes, unless as the same inquiries are made of all employees.
- After employment starts? No, unless the request job-related and “consistent with business necessity.”

Civil Rights Issues

FMLA applies to substance abuse treatment, but be careful of pretextual adverse actions

Specific MAT issues:

- Reasonable Accommodation from Employer to participate in therapy.
- Recovery Homes prohibiting MAT
 - Unwilling vs. not-equipped
- Professional Licenses (including those in the medical field)
 - MAT is disfavored.
 - Outright rule banning probably violates ADA, but Indiana's licensing Boards generally do NOT allow MAT patients to obtain/maintain license
 - Area for advocacy/policy change
 - Other licenses vary (EX: CDL license holders cannot be on methadone).

In general with discrimination claims—major proof/evidence issues

- Indiana is an “at will” state.

Drug Courts/Criminal Justice

Drug Courts have proliferated as a means to be less punitive and encourage treatment.

Some Drug Courts offer additional benefit of withholding, or rescinding, convictions.

Some Drug Courts are focused on “highest risk” individuals, with goal of diverting from prison.

In practice, options and management are largely dependent on program, Judge and Prosecutor.

Best practice: “Sanction schedule” (Graduated sanctions for missing treatment or failed drug test, eventually resulting in jail time)

Best practice: “wrap around services” with a focus on more than drug testing, including employment, health care and social issues.

Most serious issues for individuals: failing to appear for court dates

Drug Courts/Criminal Justice

DUI with MAT

- Methadone: Yes, but it is a defense if drug was prescribed and administered for legitimate medical purpose.
- Buprenorphine/Naltrexone: No

Providers are strongly encouraged to educate and participate with local drug courts

Social Security Disability

Basic Eligibility: disability substantially impairs you from working

Addictions are not considered in this context

To get disability with addictions, must show that, even if there was no addiction, other disabilities would prevent work

Really important role for providers to explain interactions between addictions and other medical conditions, especially co-occurring mental illness

Medical records usually aren't enough (need provider participation)

Family Law/D.C.S.

Indiana DCS is overwhelmed (epidemic/ODU factors into that)

- Quality/attitudes vary greatly by caseworker
- Real role for providers to explain nature/course of treatment to DCS and CHINS court
 - Slowly starting to appreciate the OUD epidemic and shifting/opening minds.
- Attitudes towards MAT vary greatly

Other family law issues

- The myth of the “notarized statement”
 - Only *court order* can change custody/child support
 - Common situation: both parents are individuals with O[S]UD, one enters recovery and assumes primary care of the child, but parties never formally change custody
- Standby guardianship/third party POA
- Grandparents taking over custody (legal intervention)

Family Law/D.C.S.

Child Support—major re-entry barrier

It really depends upon what the incarceration is for:

- Incarcerated for failure to pay child support
 - Criminal Non-support (PUNISH)
 - Rare, severe sanction
 - All states have, felony or misdemeanor
 - Civil Contempt (PROMPT COMPLIANCE)
 - Much more common.
 - Usually less severe penalties
- Incarcerated (for other conviction) with child support order
 - Indiana (and most states) allow for modification during incarceration
 - Need to be proactive as incarcerated, non-custodial parent

Expungements

Variance between what is really a “Sealing” of a conviction versus a true “Expungement.”

Time limitations:

- 8 years for felony.
- 5 years for misdemeanor.
- Can receive permission to “file early” with prosecutor’s assent.

One time only

Effect: person is treated (outside of the legal system) as if the conviction or arrest ever occurred:

- Employment
- Licensure (including professional)
- Can still be utilized if arrested in future of bail and enhancement purposes.

Specialized Driving Privileges

- For any reason, including multiple OWIs, HTV, Child Support, Failure to provide insurance, etc.
- Relatively recent (2015) provision that dramatically permitted people to obtain driving privileges
- Applies to:
 - Suspensions related to criminal convictions.
 - Suspensions related to administrative (i.e. BMV) issues such as unpaid reinstatement fees.
 - Suspensions related to child support.
 - Suspensions related to arrest.
- Two basic types (not necessarily mutually exclusive):
 - “time/place/manner” (certain hours, locations, etc.)
 - Prior restraint (Ignition interlock, mandatory treatment etc.).
- Completely up to the court.
- Insurance is a hurdle, and some courts require proof of prepayment and/or SR-22.
- ONLY EXCEPTION: Refusal to take chemical test.

Advanced Directives

WHAT

- Written directive by individual instructing healthcare providers on wishes relative to medical treatment in event of incapacitation

Doesn't need to be overly-formal

- Part I Appointment of Healthcare Surrogate / POA
- Part II Indiana Declaration
 - Living Will Declaration
 - Life-prolonging Procedures Declaration
- Part III Signatures (witnessed by two *independent* adults) (if granting POA – notarized as well)

Can attach organ donation instructions, formal form

Can be revoked orally or in writing

Advance Directives (Cont'd.)

Psychiatric Advance Directives

Instructive PAD: gives instructions about specific mental health treatment a person wants should he or she experience a mental health crisis

- Wishes can be overridden for health or practical reasons (Ulysses Clause)
Proxy PAD: names a healthcare proxy or agent to make treatment decision

Advance directives for substance use

Not codified anywhere

Being studied by some states

Could be a useful tool, some ideas for provisions:

Proxies

Individuals that hinder or negatively impact recovery

Temporary custody of children, pets

Brand new area—open for examination and creativity

HIPAA

First and foremost, of the love of all things great and small....

- SPELL IT CORRECTLY (2 A's!!!)

Way too broad to really scratch the surface

No private cause of action for violation of HIPAA

BUT

- Understand how serious it is
- licensure issues
- employment issues

Walgreen Co. v. Hinchy, 21 N.E.3d 99 (Ind. Ct. App. 2014)

- PLEASE DON'T BE A WITHERS!

DEA Investigations

DEA is *ESPECIALLY* aggressive in investigating both prescribers and dispensers of opioids, methadone, buprenorphine

Common, sneaky DEA tactic is to scare you into signing a surrender of prescribing/dispensing *for cause* certificate (DEA-104) but "don't worry, you can get it back in 6 months...."

- WRONG, incredibly difficult to regain a certificate to prescribe/dispense controls.
- Immediate right to counsel – exercise it
- Don't sign ANYTHING

Attorney General Investigations/Complaints

WHO

- PATIENTS/CLIENTS, DISGRUNTLED EMPLOYEES, YOUR LICENSING BOARD

WHAT

- The "small c" complaint

WHEN

- 20-days from date of complaint letter to you
- Usually extended 30-days

HOW

- Strongly encouraged to get legal counsel involved
- Very high number of complaints dismissed at the "small c" stage
- Make sure your address is always up to date with the IN PLA

Attorney General Investigations/Complaints

Formal Complaint (if AG decides to pursue sanctions after investigation)

Administrative trial before the applicable licensing board

Sanctions

- Permanent revocation of license
- Suspension
- Letter of Reprimand

Settlement strongly encouraged

- Usually can negotiate minimal sanctions for first time licensees