



# QUICK OVERVIEW OF Legal Issues related to OUD Treatment

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# Overview/Disclaimers

- ▶ DISCLAIMERS

- ▶ NOT LEGAL ADVICE

- ▶ Meant to be “quick-hitters” on variety of topics

- ▶ Will not cover DATA Waiver issues, HIPPA, etc. Issues too complex for this short didactic.

- ▶ Overview

- ▶ EEOC guidance for EMPLOYEES

- ▶ EEOC Guidance for HEALTH CARE PROVIDERS

- ▶ Health care providers receiving MAT themselves

- ▶ Housing

- ▶ Family Law/DCS

- ▶ Advance Directives

# HOT TOPICS IN LEGISLATION

- ▶ The EEOC released new guidance in August 2020 directed at [employees](#) regarding the use of opioids and employer obligations under the ADA. ALSO, the EEOC released a companion document for [health care providers](#) aimed at helping patients who have used opioids stay employed (LINK on next slide)
- ▶ High points for employees.....
  - ▶ ADA protects those who use lawfully prescribed opioids or in recovering from prior lawful or unlawful use are protected under the ADA – those who unlawfully use opioids are not protected under the ADA.
  - ▶ Protections apply even if the employee is experiencing addiction to lawfully prescribed opioids. Opioid addiction itself is a diagnosable medical condition that can be an ADA covered disability and may require reasonable accommodations (for therapy, leave of absence, etc).
  - ▶ Under the ADA an employee cannot be denied or terminated from a job b/c they are in a MAT program unless the employee cannot do the job safely and effectively or disqualified under another federal law

# GUIDANCE FOR HEALTH CARE PROVIDERS From the EEOC

- ▶ <https://www.eeoc.gov/laws/guidance/how-health-care-providers-can-help-current-and-former-patients-who-have-used-opioids>
- ▶ Note: The ADA does not alter your ethical or legal obligations as a health care provider. You should request a reasonable accommodation on behalf of an individual or provide an employer with medical information about the patient, only if the individual asks you to do so and authorizes the release.
- ▶ Note: If you treat patients and feel they are being discriminated against in their employment b/c of a SUD disability, complaints can be filed with the DOJ (DOJ is enforcement arm of the ADA)... more on next slide...
- ▶ \*\*note, a complaint must be filed within 180 days of the alleged discrimination

# Obligations of Health Care Providers to People who are Currently Illegally Using Opioids

- ▶ Health care providers may not deny health or drug rehabilitation services to individuals because of their current illegal use of drugs if they are otherwise entitled to such services.
- ▶ *Exception: a drug rehabilitation or treatment program may deny participation to individuals who engage in illegal use of drugs while they are in the program.*

# Discrimination/Civil Rights of SUD patients

- ▶ Two components
  - ▶ “Discrimination”
    - ▶ Adverse treatment because of protected class, including disability
  - ▶ “Reasonable Accommodation”
- ▶ SUD is a protected “disability” under civil rights laws (ADA/FHA) IF person is in active treatment AND “not currently engaging in illegal use of drugs”
- ▶ DOJ defines “currently” as “illegal use of drugs **has occurred recently enough** to indicate that the individual **is actively engaged in such conduct**”
  - ▶ Employers/landlords (and many others) cannot take adverse actions on the basis of the disability
- ▶ Can an employer require disclosure of prescriptions/medical treatment/med exam?
  - ▶ Before job offer, no, unless it is directly related to job duties
  - ▶ After job offer, but before employment, yes, but only if the same inquiries/exams are made of all employees
  - ▶ Once someone is working, only if job-related and “consistent with business necessity”
  - ▶ If drug screening, important to allow employee to show medication list and prescriptions. Drug screening to determine use of illegal use is different than medical exams and DOJ does not specifically encourage or discourage drug screening prior to employment.

# Social Security Disability

- ▶ Addiction alone is not a disability under social security
- ▶ For an addiction to qualify as a disability, 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

# A couple of cases...

- ▶ EEOC vs. Softpro...
- ▶ Employee with OUD took leave to attend an in-patient treatment facility to eliminate his need for MAT. Employer questioned the employee about the purpose of his leave; employee disclosed that he went to an in-patient program to eliminate his need for MAT. Five days later, the employer terminated the employee. The employee was terminated because he participated in a MAT program.
- ▶ Consent Decree/Agreement: Pay the employee \$80,000. Revise, implement, and distribute personnel policies stating that the company does not exclude employees based on their participation in a MAT program. Provide annual training, post notice related to Consent
- ▶ No. 5:18-cv-00463 (E.D. N.C.)



## EEOC vs. Randstad LP

Applicant who had OUD that substantially limited a major life activity sought placement as a production laborer.

Applicant alleged that she disclosed that she was in a methadone treatment program. Applicant alleged that the agency refused to hire her due to her methadone use.

*No. RDB-15-3354 (D. Md.)*

Consent Decree - Pay the applicant \$50,000. Agree to not exclude applicants who use prescribed medication if certain conditions are met. Take steps if medication's use poses a threat to the applicant or others

# HEALTHCARE PROVIDERS PRESCRIBED MAT THEMSELVES

- ▶ Some de-identified case presentations during ECHO have involved medical professionals who are receiving Medically Assisted Treatment for OUD and have related issues with their license/employment.
- ▶ **Why is this an issue if the EEOC has explained that OUD is considered a disability?**

Federal law requires the employer to consider 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.2(r).

Very broadly, can the individual safely perform the duties of his/her job? Or is a “direct threat” present such that reasonable accommodations can not resolve the issue? Safety concerns may justify a suspension of duties or other adverse action if the risk rises to the level of a “direct threat,” which means a significant risk of substantial harm to self or others that cannot be eliminated or reduced to an acceptable level with a reasonable accommodation

Factors to consider:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

\*\*blanket rule prohibiting licenses when receiving MAT is risky.

\*\*Also ADA includes protections for employers if the “reasonable accommodation” provides an undue hardship on the employer. (example: expense/difficulty. Employer with only 2 employees, etc)

So...what does Indiana say about Nurses and Doctors?

# Nursing License in Indiana

- ▶ <http://www.inprp.org/>
- ▶ NURSING
- ▶ Indiana Professional Recovery Program oversees ISNAP – mandatory vs. voluntary admission
- ▶ Nursing License
  - ▶ ISNAP (Indiana State Nursing Assistance Program for nurses struggling with substance abuse) <http://www.inprp.org/>
  - ▶ **Indiana Admin Code includes this language:** “**(b)** The treatment plan referenced in the RMA (recovery monitoring agreement) must be abstinence based.” 848 Ind. Admin. Code 7-1-6
  - ▶ **Definitions in code define treatment/recovery/isnap as abstinence based**

# Physicians Licensed in Indiana

- ▶ [https://www.ismanet.org/ISMA/Education/PAP/Physician\\_Assistance\\_Program.aspx](https://www.ismanet.org/ISMA/Education/PAP/Physician_Assistance_Program.aspx)
- ▶ Indiana law empowers the ISMA Physician Assistance Program and other similar committees to intervene on an impaired physician and insist on appropriate treatment. Indiana Code 844 IAC 5-2-8 states that as long as an impaired physician follows the prescribed treatment plan, no reporting to the Medical Licensing Board of Indiana is required. If, however, an impaired physician fails to comply with the course of treatment or make satisfactory progress, the ISMA program staff must report this information to the executive committee of the hospital, which in turn must report the non-compliance to the Medical Licensing Board of Indiana. Or the ISMA program staff can report such violations directly to the Medical Licensing Board.

# Housing Discrimination

- ▶ Fair Housing Act:
- ▶ Prohibits discrimination on the basis of
  - ▶  Race, color, or national origin
  - ▶  Religion
  - ▶  Sex
  - ▶  **Disability** (including OUD)
  - ▶  Familial status
- ▶ Prohibits discrimination in public and private housing (includes student housing, nursing homes, assisted living, apartments, etc)

## Housing discrimination case...

### DOJ Settlement with Charlwell Operating, LLC

Skilled nursing facility allegedly denied admission to a patient with OUD due to the patient's use of Suboxone. The facility allegedly imposed eligibility criteria that screened out individuals with OUD. Allegedly denied equal opportunity to benefit from the facility's services

In settlement, Charlwell Operating, LLC agreed to:

Adopt a non-discrimination policy

Provide training on the ADA and OUD to admissions personnel

Pay a civil penalty

# Family Law/DCS

- ▶ Who is DCS? The Department of Child Services – a State Agency created in 2005 by Governor Mitch Daniels (was previously under FSSA as the Office of Family and Children)
  - ▶ 3 Big Parts of DCS – the hotline, investigation division, ongoing services division (*known by many different names – investigation = assessment and ongoing = permanency*)
  - ▶ Real role for providers to explain nature/course of treatment to DCS and CHINS court
  - ▶ Attitudes towards MAT vary greatly by county/by person
- ▶ **CAPTA: Child Abuse Prevention and Treatment Act**
- ▶ It's why hospitals, docs, etc have to report
  - ▶ Requires States to have child abuse and neglect reporting laws
  - ▶ Requires the investigation of reports of abuse and neglect
    - ▶ Must have notice and appeal process
  - ▶ Provides a GAL/best interest representative in every child welfare case
  - ▶ Makes child welfare records confidential



## A Few Relevant CHINS (child in need of services) Statutes

\*IC 31-34-1-1 – Neglect

\*IC 31-34-1-10 The child is born with fetal alcohol syndrome, neonatal abstinence syndrome or with any amount of controlled substance, a legend drug 1 or a metabolite of a controlled substance or legend drug in the child's body, including the child's blood, urine, umbilical cord tissue, meconium.

\*IC 31-34-1-11 - The child has an injury, abnormal physical or psychological development, symptoms of neonatal intoxication or withdrawal or experiences risks or injuries from the mother's use of alcohol, controlled substance or legend drug during pregnancy

KEY ELEMENT IN ALL OF THESE SITUATIONS is COERCIVE INTERVENTION – needed or not? DCS investigation will attempt to determine yes or no.

Example: Coercive Intervention not needed? Vs. needed?

### Other family law issues

Custody modification – must involve a court

Standby guardianship/third party/ POA

Grandparents taking over custody (BIG issue)

# POA, Healthcare POA Living Will

- ▶ Generally: POA, Healthcare POA, Living Will
- ▶ Psychiatric Advance Directives
  - ▶ Instructive PAD: gives instructions about the specific mental health treatment a person wants should he or she experience a psychiatric crisis
    - ▶ Wishes can be overridden for health or practical reasons
  - ▶ Proxy PAD: names a healthcare proxy or agent to make treatment decisions

# Resources

- ▶ As a provider, you are in the best position to advocate and educate for patients
- ▶ Medical-Legal Partnership Model
- ▶ More info: <http://medical-legalpartnership.org/mlp-resources/opioid-crisis-brief/>
- ▶ [https://www.ismanet.org/ISMA/Education/PAP/Physician\\_Assistance\\_Program.aspx](https://www.ismanet.org/ISMA/Education/PAP/Physician_Assistance_Program.aspx)
- ▶ Indiana Code 844 IAC 5-2-8
- ▶ DOJ contact: Berger, Stephanie (CRT) [Stephanie.Berger@usdoj.gov](mailto:Stephanie.Berger@usdoj.gov)
- ▶ Ada [www.ada.gov](http://www.ada.gov)
- ▶ EEOC [www.eeoc.gov](http://www.eeoc.gov) | [info@eeoc.gov](mailto:info@eeoc.gov)
- ▶ Nursing Assistance Program
- ▶ Fair Housing Act [www.hud.gov](http://www.hud.gov)
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