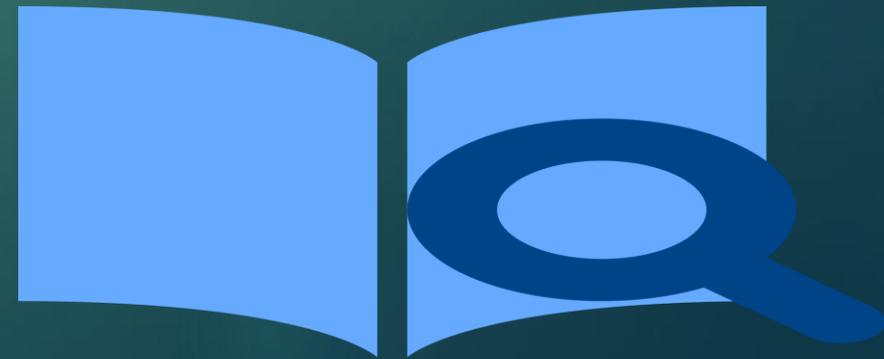




# QUICK OVERVIEW OF Legal Issues related to OUD Treatment

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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. (except in “hot topic” overview ☺)

- ▶ Overview

- ▶ HOT TOPIC

- ▶ EEOC Guidance for EMPLOYEES & HEALTH CARE PROVIDERS

- ▶ Health care providers receiving MAT themselves

- ▶ Housing

- ▶ Family Law/DCS

- ▶ Advance Directives

# OVERVIEW OF LEGAL SYSTEM

## IMPACT ON OUD AND WHY

- ▶ Federal Laws – regulate the possession, trafficking and manufacture of drugs (both legal and illegal drugs). Always supersedes state law in the event of conflict between the two.
- ▶ The Controlled Substances Act is a significant federal act and gives Federal jurisdiction over specific substances.
  - ▶ Established Classes I through V for controlled substances
    - ▶ Class I – high potential for misuse. No accepted medical treatment in US
    - ▶ Class II – high potential for misuse. Require strict controls for use
    - ▶ Class III – accepted use in medical treatment but risk of abuse/dependence
    - ▶ Class IV – lower potential for misuse and dependence
    - ▶ Class V – even lower potential for misuse.

# Overview of Legal System Cont..

Various federal agencies, (the DEA, the FBI, US Marshals Service (USMS), Department of Homeland Security, US Postal Inspection Service, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) cooperate with state and local agents to reduce drug use and distribution across the country

The majority of drug offenses are handled in state court and by state and local law enforcement, but federal agencies can take over at any time.

There can be major differences in laws of different states (evolving marijuana laws are a good example)

# HOT TOPICS IN FEDERAL LEGISLATION

- ▶ X Waiver - A Federal Requirement 21 U.S.C. § 823(g)(2) (i.e., a DATA 2000 waiver)
  - ▶ The X Waiver requires medical professionals to undergo training and obtain the waiver prior to being permitted to prescribe MAT for patients struggling with opioid use disorder.
  - ▶ As the Trump administration was exiting office, on January 14<sup>th</sup>, 2021 a decision was made to reduce the X waiver mandate and enable more physicians to treat OUD with MAT. Under this directive, physicians need not obtain an X waiver, but nurses and PA were still required to.
  - ▶ The Biden administrative took office as this directive was undergoing the formal approval process and the directive has stalled at this point. The final verdict on this change of direction is something that patient advocates and health care professions are watching closely.

# Discrimination/Civil Rights of SUD patients

- ▶ The Americans with Disabilities Act (ADA) protects individuals with disabilities from discrimination and requires employers to make reasonable accommodations.
- ▶ Two components
  - ▶ “Discrimination”
    - ▶ Adverse treatment because of protected class, including disability is prohibited
  - ▶ “Reasonable Accommodations –
    - ▶ a change the employer can make to ensure that a qualified individual with a disability can perform the essential functions of the job and enjoy equal employment opportunities
    - ▶ Examples: special parking

# Rights of Patients with SUD cont....

- ▶ 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**”
  - ▶ Per the ADA - Employers/landlords (and many others) cannot take adverse actions on the basis of the disability
- ▶ What Reasonable Accommodations would be appropriate?
  - ▶ No penalty for time off to receive MAT
  - ▶ An accommodation is considered reasonable if it does not cause the employer undue hardship or a direct threat.
  - ▶ The employee must also be qualified to perform the essential functions of the job
  - ▶ \*\*\*note: ADA applies to employers with 15 or more employees

# ADA and Substance Abuse for Employers and Employees

- ▶ An individual who is currently engaging in the illegal use of drugs is not an “individual with a disability” when the employer acts on the basis of such use.
- ▶ An employer may not discriminate against a person who has a *history* of drug addiction but who is not currently using drugs and who has been rehabilitated.
- ▶ An employer may prohibit the illegal use of drugs and the use of alcohol at the workplace.
- ▶ It is not a violation of the ADA for an employer to give tests for the illegal use of drugs.
- ▶ An employer may discharge or deny employment to persons who currently engage in the illegal use of drugs.
- ▶ Employees who use drugs or alcohol may be required to meet the same standards of performance and conduct that are set for other employees.
- ▶ Employees may be required to follow the Drug-Free Workplace Act of 1988 and rules set by federal agencies pertaining to drug and alcohol use in the workplace.

# A couple of case examples...

- ▶ 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

# 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.*

# 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?**
- ▶ **Indiana State agencies and laws become relevant here.....licensing boards, etc.**

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.

# Social Security Disability

- ▶ Different considerations than ADA...
- ▶ 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

# Social Security determination of Disability cont...

- ▶ **Code of Federal regulations determination of disability for purposes of SSI .**
- ▶ (a) *General.* If we find that you are disabled and have medical evidence of your drug addiction or alcoholism, we must determine whether your drug addiction or alcoholism is a contributing factor material to the determination of disability, unless we find that you are eligible for benefits because of your age or blindness.
- ▶ (b) *Process we will follow when we have medical evidence of your drug addiction or alcoholism.* (1) The key factor we will examine in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether we would still find you disabled if you stopped using drugs or alcohol.
- ▶ (2) In making this determination, we will evaluate which of your current physical and mental limitations, upon which we based our current disability determination, would remain if you stopped using drugs or alcohol and then determine whether any or all of your remaining limitations would be disabling.
- ▶ (i) If we determine that your remaining limitations would not be disabling, we will find that your drug addiction or alcoholism is a contributing factor material to the determination of disability.
- ▶ (ii) If we determine that your remaining limitations are disabling, you are disabled independent of your drug addiction or alcoholism and we will find that your drug addiction or alcoholism is not a contributing factor material to the determination of disability.

# 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

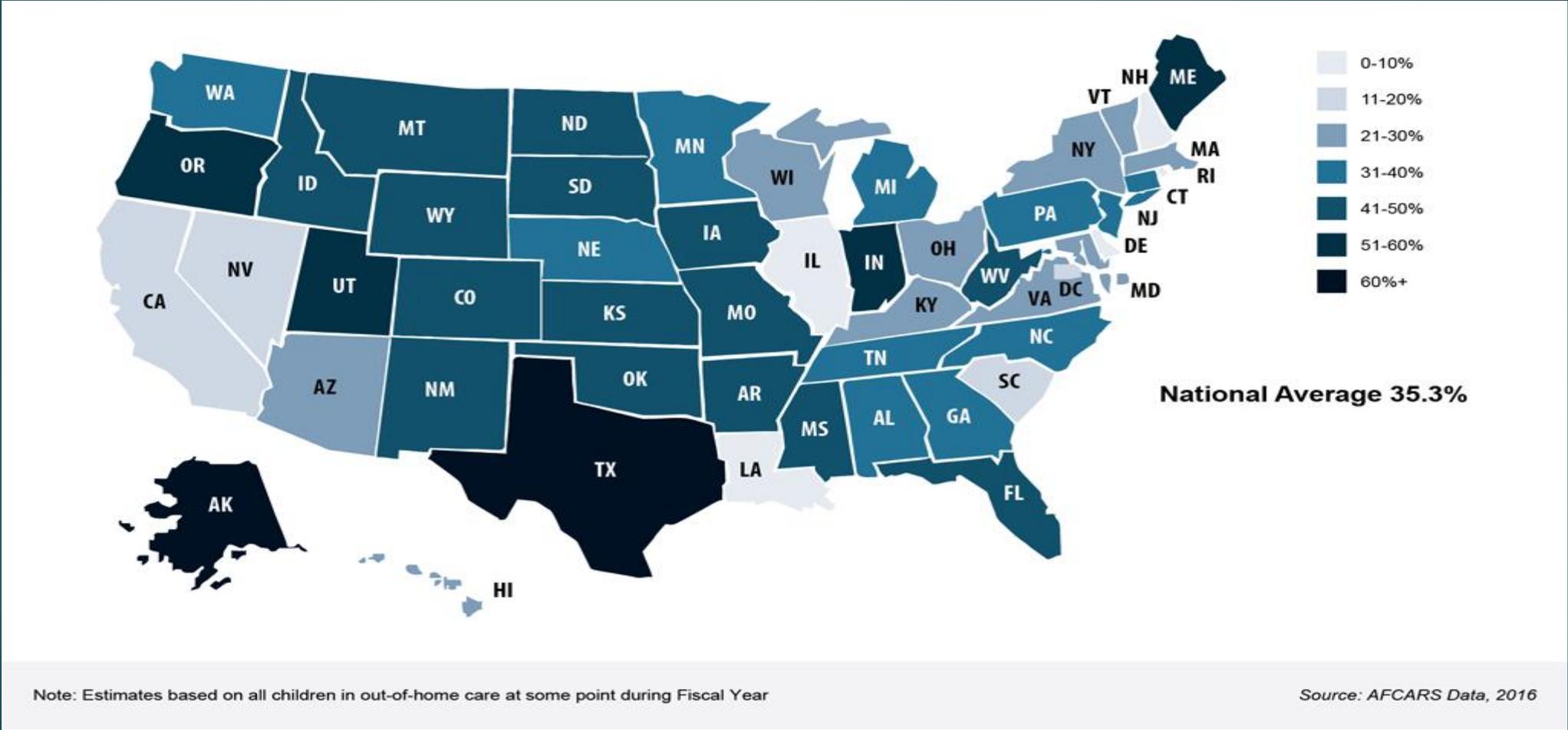
# A super short list of Criminal Law Statutes in Indiana

- ▶ [Indiana Code 35-48-4-7](#) **Indiana Possession of a Controlled Substance**
- ▶ [Indiana Code 35-48-4-2](#) – **Dealing in a schedule I, II, or III controlled substance**
- ▶ [Indiana Code 35-48-4-6](#) – **Possession of cocaine or a narcotic drug**
- ▶ [Indiana Code 35-48-4-1](#) – **Dealing in cocaine or a narcotic drug**
- ▶ [Indiana Code 16-42-19-18](#) – **Possession or control of hypodermic needles**
- ▶ [Indiana Code 35-48-4-8.3](#) – **Possession of Paraphernalia**
- ▶ \*\*each statute defines the relevant factors for the charge and explains the level of a felony.

# 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

# Parental Alcohol or Other Drug Use as a Contributing Factor for Reason for Removal by State, 2016



## 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

- ▶ Medical-Legal Partnership Model: <http://medical-legalpartnership.org/mlp-resources/opioid-crisis-brief/>
- ▶ Indiana Code
- ▶ [https://www.ismanet.org/ISMA/Education/PAP/Physician\\_Assistance\\_Program.aspx](https://www.ismanet.org/ISMA/Education/PAP/Physician_Assistance_Program.aspx)
- ▶ Indiana Administrative Code 844 IAC 5-2-8
- ▶ [https://www.ssa.gov/OP\\_Home/cfr20/416/416-0935.htm](https://www.ssa.gov/OP_Home/cfr20/416/416-0935.htm)
- ▶ 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)
- ▶ 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 workers](#)  
<https://www.eeoc.gov/newsroom/eeoc-releases-technical-assistance-documents-opioid-addiction-and-employment>
- ▶ My contact info: [carey@childadvocates.net](mailto:carey@childadvocates.net)