

QUICK OVERVIEW OF Legal Issues related to Opioid Use Disorder

APRIL 2023

CAREY HALEY WONG



Overview/Disclaimers

- ▶ DISCLAIMERS
 - ▶ NOT LEGAL ADVICE
 - ▶ Meant to be “quick-hitters” on several topics
 - ▶ I will provide links to additional information on each topic
- ▶ Overview
 - ▶ OUD as a disability (when is it vs. when is it not)
 - ▶ Health care providers receiving MAT themselves
 - ▶ Licensure issues
 - ▶ Family Law/DCS
 - ▶ Advance Directives
 - ▶ HIPAA High Points
 - ▶ X Waiver



The ADA and Disability Rights

Substance Use Disorder is a protected disability under civil rights laws including the ADA and FHA (protections for employment and housing).

There are two elements to ensuring protection:

1. The person must be in active treatment
2. The person cannot currently engage in illegal substance abuse

So what does that mean?

1. Neither employers or landlords can take adverse action on the basis of a disability
2. So a person cannot be discriminated against for seeking treatment for OUD (including MAT)
3. Employers have a duty to make reasonable accommodations.

Note: 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

Practically Speaking...for Employers

An individual currently engaged in illegal substance abuse is not an individual with a disability

An employer does have the right to prohibit the use of drugs and alcohol in the workplace

An employer has the right to test employees for illegal substance abuse

An employer can terminate an employee or deny employment for illegal substance abuse

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

Indiana's response to the employment issue – in recognition of SUB as a disability, Indiana enacted HB 1007 the bill providing incentives and tools for employers

Link: Indiana Workforce Recovery <https://www.in.gov/recovery/employers/>

Employment related issues cont..

Employers should take the following steps when implementing drug-free workplace policies and practices:

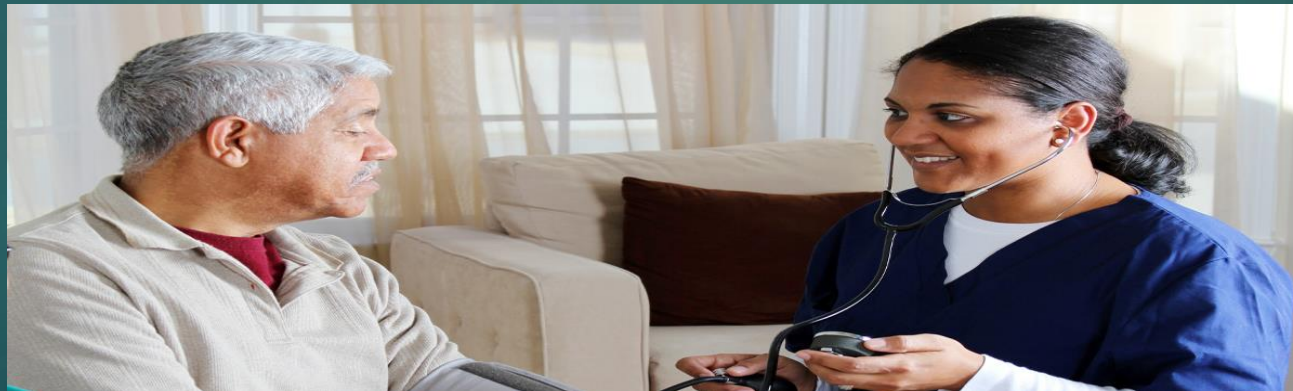
1. Consult an employment attorney to be sure policies are not discriminatory
2. Set clear penalties for policy violations
3. Put the policies in writing and ensure employees sign them
4. Provide training on how supervisors should respond to workplace drug and alcohol misuse
5. Document employee performance
6. Do not accuse or take disciplinary action just because behavior seems impaired. Try first to clarify the reason for impairment.
7. Protect Privacy of employees
8. Be consistent
9. Know the employees
10. Involve employees at all levels in developing and implementing policies

Link to SAMHSA for more information <https://www.samhsa.gov/workplace/legal/federal-laws>

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. The ADA does permit a program to require participants to abstain from illegal drugs while in the program



Examples of ADA violations

Example 1: A nursing home refuses to admit a patient with Opioid Use disorder because the patient takes prescribed MAT. The facility prohibits MAT. The facility's exclusion of patients based on their OUD would violate the ADA.

Example 2: a jail does not allow inmates to continue the MAT prescribed before detention. The jail's blanket policy would violate the ADA

Example 3: an emergency room routinely turns away people experiencing drug overdoses, but continues to admit all other patients with emergency health issues. The hospital would be in violation of the ADA for denying health services to those engaged in current illegal drug use (*note ADA does say that an individual cannot be denied health services based on the current use of drugs if the individual is otherwise entitled*)

Example 4: a mentoring program requires volunteers to submit to random tests showing the volunteers do not engage in illegal substance abuse. The program then dismisses a volunteer who tests positive for opioids without a valid prescription. This does NOT violate the ADA because dismissal was based on current illegal use.

https://www.ada.gov/opioid_guidance.pdf

A case example with a DOJ complaint

EEOC vs. Softpro...

Employee with OUD took leave to attend an in-patient treatment facility to eliminate his need for MAT. The 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.)

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.

There also must be a finding that the addiction did not contribute to the disability (for example: if smoking caused emphysema this could be problematic under SSA guidelines for disability)

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

HEALTHCARE PROVIDERS WHO ARE PRESCRIBED Medically Assisted Treatment

Why is this an issue if the ADA and EEOC have determined substance abuse disorder to be 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

For professional licenses, including medical licenses, MAT is still disfavored. Unfortunately, Indiana’s licensing boards generally do not allow MAT patients to obtain or maintain their licenses

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



DOJ decision March 2022

Justice Department Finds that Indiana State Nursing Board Discriminates Against People with Opioid Use Disorder

The DOJ opened an investigation in response to a complaint from a nurse alleging that she was denied participation in the State Nursing Assistance Program because she takes prescribed medication for OUD. The investigation corroborated that the Nursing Board prohibits program participants from using OUD medication and that tapering the nurse off her medication would come with a significant risk of relapse and harm.

“Recovery and monitoring programs must allow individuals to use proven medications that support their recovery, including prescribed medications that treat Opioid Use Disorder,” said Assistant Attorney General Kristen Clarke of the Justice Department’s Civil Rights Division. “Refusing to allow individuals to participate in a required support program because of their disabilities violates the ADA and makes it harder for individuals to secure and maintain jobs and livelihoods. Removing discriminatory barriers to employment is an important priority of the Civil Rights Division

What is next?

DOJ instructions for next steps: To remedy these violations, and to protect the civil rights of individuals with OUD going forward, the Nursing Board should promptly implement corrective measures, including the following:

1. Adopt or revise written policies to eliminate the ban on ISNAP participants using medication to treat OUD and to explicitly state that the Nursing Board, and its contracted vendors, may not discriminate against, exclude from participation, or deny the benefits of its services, programs, or activities—including ISNAP—to qualified individuals with disabilities because they have OUD.
2. Appropriately train and educate all Nursing Board staff and the staff of ISNAP vendors about OUD and the nondiscrimination requirements of Title II of the ADA.
3. Pay compensatory damages to the Complainant and other aggrieved individuals for injuries caused by the Nursing Board's actions described in this letter.
4. Provide the United States with written status reports delineating all steps taken to comply with these requirements, including the date(s) on which each step was taken, and, where applicable, information sufficient to demonstrate compliance

The decision: <https://www.justice.gov/opa/pr/justice-department-finds-indiana-state-nursing-board-discriminates-against-people-opioid-use>

Physicians Licensed in Indiana

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.

MEDICAL LICENSES Continued

In Indiana, the Attorney General's Office handles complaints against medical professionals. Anyone can file a complaint with the AG's office.

The Attorney General investigates consumer complaints to determine if there has been a violation of the standards of practice of regulated professionals. If the Office determines that a practitioner has violated the standards of practice of his or her profession, the Office will bring an administrative complaint and will seek discipline against the practitioner's license. If an emergency situation exists, where there is a clear and immediate danger to the public health, and safety if a practitioner is able to practice, the Office can also file a Summary Suspension Petition to suspend a practitioner's license for 90 days.

<https://www.in.gov/attorneygeneral/consumer-protection-division/licensing/#:~:text=If%20you%20have%20a%20complaint,6330>.

<https://www.in.gov/pla/professions/medical-licensing-board-of-indiana/>

Criminal Charges and penalties

Drug offenses in Indiana can range from a misdemeanor, which carries a maximum penalty of 180 days in jail and a \$1,000 fine, to a Level 2 felony, which carries a maximum penalty of 30 years in prison and a \$10,000 fine.

Possession is an example of a misdemeanor: The most common type of drug offense in Indiana is possession of less than 30 grams of marijuana. This is charged as a Class A misdemeanor, which carries a maximum penalty of 365 days in jail and a \$5,000 fine. Possessing more than 30 grams—or having a prior conviction for possession of marijuana—will automatically increase the charge and related penalties.

Level 2 felony example is dealing 12 grams or more of heroin or 10 grams or more of cocaine or meth.

Indiana Criminal Code: <http://iga.in.gov/legislative/laws/2017/ic/titles/035>

Expungements - When can those charges go away?

Some convictions can be expunged or erased from a persons record if certain conditions are met.

Time limits:

Most felonies require 8 years to pass and no additional convictions

Some violent felonies require 10 years

Misdemeanor charges (and old Class D felonies) require 5 years

It's possible to receive permission to file early if prosecutor agrees

Some offenses are not eligible for expungement at all.



One time only

Effect: outside of the legal system the person is treated as though the conviction never occurred (*can still be used in the criminal system if the person is arrested in the future for enhancement purposes*)

*employment

*licensure

<https://www.in.gov/isp/criminal-history-services/expunge-criminal-history/>

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

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

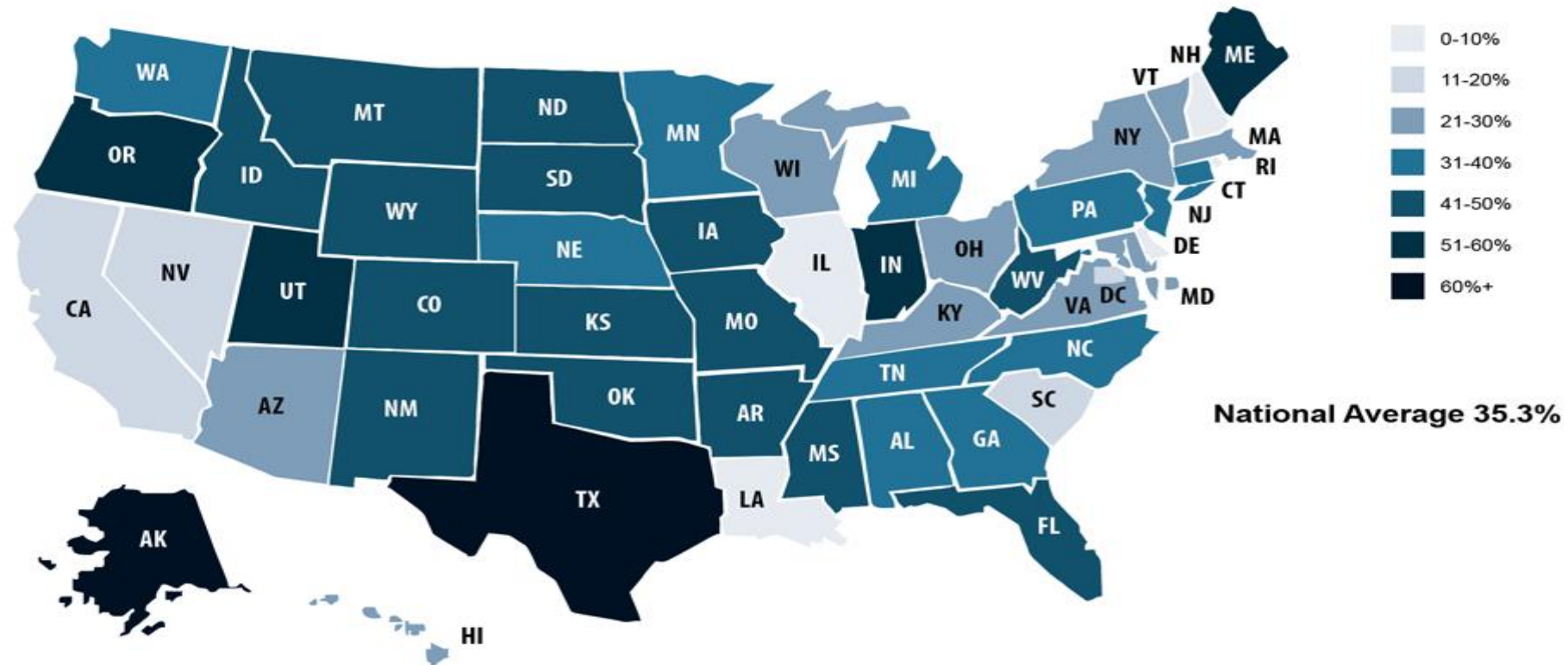
Provides a GAL/best interest representative in every child welfare case

Makes child welfare records confidential

Child Abuse Index



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



Note: Estimates based on all children in out-of-home care at some point during Fiscal Year

Source: AFCARS Data, 2016

CAPTA continued

Significant Amendments to CAPTA in 2016 and 2018

Requires states to develop plans of safe care for infants born and identified as being affected by substance use or withdrawal symptoms or a fetal alcohol spectrum disorder

A POSC is a plan designed to ensure the safety and well-being of an infant with prenatal substance exposure following his or her release from the care of a healthcare provider by addressing the health and substance use treatment needs of the infant and affected family or caregiver. States have flexibility as to the implementation consideration of their POSCs

If a baby or mother has a positive toxicology screen or the baby shows signs of w/draw, notification to CPS is required by CAPTA, laws and/or policies in 14 States (including Indiana) make clear that a notification is not considered a report of child abuse or neglect unless there is evidence of maltreatment or risk of harm to the infant.

Info on DCS's plan of Safe Care: <https://www.childwelfare.gov/pubPDFs/safecare.pdf>

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 – The statutes require the above elements AND that the coercive intervention of the court is needed in order to remedy the issues of child safety. 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)

Valid Prescription and Good Faith Use of Drugs

IC §31-34-1-12 and 13 are the exceptions statutes

A child is not a CHINS if the mother had a valid prescription for the controlled substance or legend drug that was detected in the child's body at birth, or the mother had a valid prescription for the controlled substance or legend drug that she consumed during pregnancy which caused damage or endangerment to the child's development. The mother must show that she made a good faith attempt to use the drug according to prescription instructions.



Child Welfare Timelines

Investigation timelines –if report alleges neglect (5 days), abuse (under 24 hours), imminent danger (immediately)

Removal - if a child is removed from parents, a hearing must be conducted within 48 hours

Adjudication – 60 days or 120 if all parties agree

Disposition – 30 days after adjudication

Permanency – every 12 months or earlier

Termination of Parental Rights – mandatory filing if removed for 15 of the last 22 months. The trial must conclude 180 days after filing.

The timelines are written with the child's welfare and need for permanency in mind.

POA, Healthcare POA Living Will

Generally: Written directive by individual instructing healthcare providers on wishes related to medical care in the event of incapacitation. (POA, Healthcare POA, Living Will)

- I. Appoint a health care POA
- II. Indiana Declaration (a Living Will, Life Prolonging Procedures Declaration)
- III. Signatures witnessed by two Independent Adults

These can be revoked orally or in writing.

More Information and Forms: <https://www.in.gov/health/cshcr/indiana-health-care-quality-resource-center/advance-directives-resource-center/>

HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is a federal law that required the creation of national standards to protect sensitive patient health information from being disclosed without the patient's consent or knowledge

Disclaimer: This is WAY too broad to cover in depth here. Just a few high points:

I. There is no private cause of action for HIPAA violations

II. Who has to comply? Every healthcare provider who electronically transmits health information in connection with certain transactions • Health plans • Healthcare clearinghouses • Business associates that act on behalf of a covered entity, including claims processing, data analysis, utilization review, and billing

III. What is protected? Protected Health Information: Individually identifiable health information that is transmitted or maintained in any form or medium (electronic, oral, or paper) by a covered entity or its business associates, excluding certain educational and employment records

<https://www.cdc.gov/phlp/publications/topic/hipaa.html#:~:text=The%20Health%20Insurance%20Portability%20and,the%20patient's%20consent%20or%20knowledge>

<https://www.hhs.gov/hipaa/for-professionals/index.html>

What is coming up next with HIPAA?

Proposed Changes to 42 CFR Part 2 – if these changes go into effect they will allow for better coordination of care for those with Substance Use Disorder and also strengthen protections for SUD records so that individuals will not avoid treatment for SUD for fear of exposure to criminal consequence.

More Info in the news release attached below from our friends at Quarles and Brady.

<https://www.quarles.com/newsroom/publications/substance-abuse-disorder-records-42-cfr-part-2-proposed>

The X Waiver

An “X waiver” refers to the Drug Addiction Treatment Act (DATA 2000) “waiver” legislation that authorized the outpatient use of buprenorphine for the treatment of opioid use disorder. If a prescriber was authorized to prescribe buprenorphine for the treatment of OUD, an “X” was added to the prescribers DEA registration.

2021 – There was a change designed to eliminate some barriers to treatment.

the changes in 2021 exempted eligible practitioners from certain training requirements and the provision of psychosocial services which were previously necessary when prescribing buprenorphine to 30 or fewer patients.

with the 2021 change, NPs, PAs, etc must be licensed to prescribe Schedule III, IV, or V meds for pain, complete 24 hour training program before applying for the waiver.

And NOW....

Goodbye Waiver!

December 29, 2022, with the signing of the Consolidated Appropriations Act of 2023 (the Act), Congress eliminated the “DATA-Waiver Program.”

The special waiver (e.g., a DATA-Waiver) is no longer required to treat patients with opioid use disorder (OUD). Additionally, the DATA-Waiver registration number is no longer required on opioid use disorder prescriptions. Opioid use disorder prescriptions, like all prescriptions, now only require a standard DEA registration number.



GOOD
BYE!

Resources

Definitions: <https://www.sгна.org/Portals/0/A00050.PDF>

Medical Legal Partnerships [http://medical-legalpartnership.org/mlp-resources/opioid-crisis-](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

Ada www.ada.gov

EEOC info@eeoc.gov

Fair Housing Act www.hud.gov

Rules for prescribing Opioids for Pain - Indiana Admin Code Rule 6 844 IAC 5-6-1

My contact info: carey@childadvocates.net