Michelle Day: [00:00:00] Good afternoon everyone, and welcome to the Fletcher Group Rural Center of Excellence's webinar series. Today's session is scheduled to run from 2:00 PM to 3:00 PM Eastern Standard Time. My name is Michelle Day, and I am your moderator for the session, along with Janice Fulkerson and Erica Walker. A couple of brief housekeeping items, and then we'll begin.

You entered today's session on mute and your video was off and will remain so for the entirety of the webinar. Your chat feature is located at the bottom right of your screen. Use the drop down feature to communicate with either the panelists only, or panelists and attendees. Please direct all questions regarding the webinar content to the Q&A section. Be advised that this meeting is being recorded and will be available to you on our website once it has been transcribed. You can access our website at www.fletchergroup.org. Also, at the conclusion of today's session, [00:01:00] there will be a short survey regarding the webinar content. Your participation in that survey is greatly appreciated and will only take a few moments to complete.

In follow up to their colleague's presentation from last month, our presenters today are Daphne Kackloudis and Jordan Burdick, also with Brennan Manna Diamond. Daphne helps implement successful business and practice strategies by navigating the dynamic and constantly evolving health care regulatory, legal, and public policy environment. Daphne has decades of experience in and around state government. Daphne graduated cum laude from Capital University Law School and with honors and with distinction from Indiana University. Jordan is a health care attorney with experience advising clients on matters concerning state scope of practice and prescriptive authority laws, HIPAA compliance, and Medicare and Medicaid reimbursement. She routinely works with federally [00:02:00] qualified health centers, medical providers, and trade associations. advising them on applicable state and federal regulations. Jordan also has experience drafting and reviewing business associate agreements and independent contractor agreements. Daphne, Jordan, the floor is yours.

Daphne Kackloudis: Thank you. Uh, we're so happy to be with you today. Jordan is going to work on, uh, turning our camera on. And, uh, we hope that you, um, will forgive us. Our camera is ahead of us, but my notes are down on the table. So, um, I may look down periodically, but I will, oops, try to look up as well. Um, we, oh, okay, there we go. Perfect. Um, we can dispense with the who are we because, um, we had a very nice introduction. We really appreciate the warm introduction and we appreciate being here as well. Um, Jordan and I are both health care attorneys. Uh, we work for the same law firm that our colleague Brandon Pauly works for, Brennan [00:03:00] Manna Diamond.

I know, um, Brandon, uh, presented last month. Jordan, Brandon, and I actually are all out of our Columbus, Ohio office, but we have offices all over the state of Ohio and in other parts of the country as well. We have the question here. Who are you? You can't tell us who you are now. Um, we should have probably put a poll in or something like that. Maybe we'll do that next time. Um, but just the questions here can sort of serve as a reminder to you that we know that you may be recovery housing operators only. Um, or you may be both recovery housing operator and an SUD treatment provider. Um, and we also know that your sizes may vary. So maybe you just have, you know, 1 or 2 beds, um, or 1 recovery residence, or maybe you have lots of recovery residences. So we know, um, from our experience, working with recovery homes and recovery housing, um, operators here in Ohio, where we're located, um, and SUD treatment providers that um, if you've seen [00:04:00] one recovery home, you've seen one recovery home. So, um, we're happy to be here and we look forward to our conversation today.

Next slide please. This is a disclaimer because we're lawyers, we have to give you a disclaimer. Brandon probably did the same thing. Uh, and this disclaimer essentially just says that though we are lawyers, we may not be your lawyers. We're probably not your lawyers. Uh, so the information we provide today, um, is really just to be taken for educational purposes, not as actual legal advice to you.

Um, and Jordan and I are going to, uh, sort of tag team this presentation. So I'm going to turn it over to her in just a minute. I'll walk through the agenda and a couple of other context slides and I'll turn it over to Jordan and then she'll give it back to me. So if you can just be patient with us while we do that, we'd appreciate that.

So you can see the agenda here. We did the introduction already. I'll do maybe 1 or 2 slides more and I'll turn it over to Jordan. She will talk mostly about the history and context of our conversation today. Uh, we will do, um, just maybe 1 or 2 slides on [00:05:00] recovery housing versus SUD treatment as it relates to the type of services and the regulatory framework. Of course, you know what recovery housing is and you know what SUD treatment are, but we're talking about kind of the intersection today. Jordan is going to do just a couple of slides on fair housing laws and lease agreements. We know that Brandon spent quite a bit of time talking about fair housing laws.

It's not the subject of our conversation today, but just a few slides. So, um, it's in your brain as you're talking about the other things and then most of the time we'll spend talking about the interplay between housing and treatment. And how to structure compliant recovery housing and SUD treatment services. And then, of course, at the end, we'll have time for questions. Next slide please. Thank you. Um, so just a couple of objectives today. We want to review the relevant fraud and abuse statutes that pertain specifically to SUD treatment, but have significant importance as it relates to the interplay between SUD treatment and recovery housing services.

We want you to learn. We'll tell you how to structure recovery housing and substance use disorder service services so that they're [00:06:00] compliant with federal and state laws. And we'll provide some tips for you as providers and organizations to follow when you're furnishing recovery housing and substance use disorder services. And I'm going to turn it over to Jordan, and I'll be back in a few slides.

Jordan Burdick: Thank you, Daphne. And fair warning, everyone, we're going to be looking up a little bit because our slides are projected from a TV, so if you see us going like this, that's why. Um, to kick things off, this slide really sets forth the universe of regulatory authorities that apply to recovery homes. We'll be talking today about laws and regulations. I'm sure you've heard those terms before. We'll also be talking about best practices. Um, laws and regulations are requirements. So, you must comply with them in order to stay out of trouble with the law. Conversely, best practices are recommendations or guidelines.

So, they're not recovered by or required by the law, rather, but we recommend that you comply with them to stay out of trouble. If you follow best [00:07:00] practices, there is a really good chance that you'll stay out of trouble. Or alternatively, if you do get into trouble, they will look kindly upon you because you tried hard to operate an effective recovery program. Also important today is that we will be focusing our discussion on federal laws. Many states do have state law counterparts to the federal laws that we're going to be discussing today. Um, so, and this is very important, we do encourage you to check your state's laws and regulations centered around recovery housing.

Daphne Kackloudis: And substance use disorder treatment.

Jordan Burdick: Yeah, thank you. Okay, let's start by setting the foundation for recovery housing's necessity in communities across the country, specifically rural communities. Rural areas commonly experience higher rates of substance use disorders compared to urban areas. This is due to a multitude of factors, including economic conditions, high unemployment rates, and limited or no access to [00:08:00] health care services and providers, including substance use disorder providers.

Relatedly, rural communities frequently face shortages of healthcare providers, including those that specialize in mental health services and substance use disorder treatment. Residents in rural areas may also have to travel longer distances to access treatment facilities, or they may lack reliable transportation, which are sizable barriers to receiving necessary substance use disorder care. And we will use the abbreviation SUD throughout this presentation to refer to substance use disorder treatment and services. Recovery housing really is a proven counterpart to long term recovery, um, and you may be thinking why, or you might know the answer, but we really feel like stable and supportive housing has been shown to significantly reduce relapse rates for individuals in recovery.

Recovery housing also creates a community of people [00:09:00] going through the same challenges that really can't be replicated in other areas. Okay, on this slide, we're going to kind of get into the nitty gritty on contrasting recovery housing and substance use disorder treatment. Recovery housing, um, or recovery homes typically operate in a non clinical setting, meaning that residents live together in a home like environment. They're not receiving substance use disorder treatment services from the clinical side in their homes.

This helps to normalize daily living and really promote their reintegration into society and building those important friendships and communities that we, um, know to be true. In contrast, substance use disorder treatment involves clinical services like withdrawal management, therapy, whether individual or group, and medical interventions that are aimed at treating substance use disorders. The point here is that [00:10:00] recovery homes may offer substance use disorder treatment, but they don't have to, and many do not. Further, substance use disorder providers bill for their clinical services, which opens them up to a wide net of federal fraud and abuse laws and regulatory provisions that we will get into later on in this presentation, whereas recovery housing operators do not bill insurance. Instead, they may and should charge rent to residents. And again, we'll have more on that in a few slides.

Daphne Kackloudis: I just want to put an asterisk next to something that Jordan said at the beginning. When we're thinking about recovery housing and SUD treatment, um, we know many of our clients, some of our clients are who are in a room with, um, uh, censored lights and they went off, but that's okay. We'll just do it in the dark. Some of our recovery housing clients, uh, do provide SUD treatment, of course, and some, um, provide SUD [00:11:00] treatment in the same, Um, building where there is an SUD treatment, I'm sorry, where there's a residential recovery housing program. So that does happen on occasion. Although the SUD treatment in that case isn't the outpatient service isn't in the recovery home.

And then one sort of additional, um, permutation of the way these programs can be set up. And I'm sure you experienced this as well. We happen to be in Ohio. Um, and in Ohio. Some, uh, SUD treatment services are able to be provided in a person's home, and where that is the case, and a person happens to be living in a recovery home, then it is, of course, permissible for that SUD treatment service to be provided in the person's home, just happens to be a recovery home. So, just sort of an asterisk next to some, sort of the way we're thinking about, um, how SUD treatment and recovery housing services can be provided together, sometimes, sometimes separately.

Jordan Burdick: Awesome. So [00:12:00] next we're briefly going to delve into fair housing laws and our colleague Brandon presented on this topic in July, so it's going to be brief, but I do think this is a very important subset of laws that are applicable to recovery homes that we should give some voice time to.

People in recovery are protected from housing discrimination under the Fair Housing Act. For people with substance use disorder, housing is a vital tool for sustaining recovery, as I'm sure you all know. Okay, so for the next few slides, we will be talking about federal fair housing laws. Recovery housing

operators are required by federal law to comply with the Fair Housing Act. Under the federal Fair Housing Act, people in recovery from substance use disorders or alcoholism are protected from housing discrimination based on disability, which you'll see here, that category is folded on the slide. Simply [00:13:00] put, Fair Housing laws protect a person's right to choose, without unlawful discrimination, where to live, and they protect people who are denied housing based on stereotypes or prejudices about groups of people, including people in recovery and those that are actively in treatment.

Okay, let's talk about what constitutes discrimination against people in recovery in the context of housing. In other words, here is what you as a landlord of a recovery housing residence cannot do to people living in your residence. The most obvious example is not renting to someone based on the fact that they have a substance use disorder or evicting them after finding out that they are in recovery from a substance use disorder and or actively seeking treatment. The important distinction here is that federal laws, the Fair Housing Act that we're talking about right now, do [00:14:00] not protect individuals who are currently engaging in illegal drug use.

Okay, Reasonable Accommodation. So residents of recovery housing do have the right to request reasonable accommodation from you, their landlord. Reasonable accommodations are modifications that allow residents to have equal access to and opportunities in the recovery home. For example, a resident is on medication assisted treatment, MAT, and they wanna live in a recovery home that has a rule against using any medications in the recovery process. Since the medication prescribed to the resident is necessary in connection to their disability, so here it would be in connection to their substance use disorder, and their recovery from that substance use disorder, that resident could request a reasonable accommodation to continue using [00:15:00] MAT while they are living at the home, and federal law would say that that reasonable accommodation should be granted.

Background checks. While federal fair housing law does not explicitly prohibit criminal background screening, HUD, which is the Department of Housing and Urban Development, does recommend that private housing providers do not use criminal history to screen tenants for housing. HUD's recommendation is especially important for those in recovery who, as a population, have a higher rate of past criminal convictions than other populations. The rationale for HUD's recommendation is that criminal history is not a good predictor of success, especially housing success, and it does cause disproportionate harm to minority communities that are in recovery and that are seeking housing. What does this mean for [00:16:00] you, assuming that you are a recovery housing operator? Well, you're not prohibited from using background checks by federal law on residents, but HUD does recommend against it. If you decide to screen tenants, with background checks, you should check everyone in the same manner according to the same policy. And you should also set forth your disqualifying criteria in writing.

This criteria is criteria that sets forth the convictions or crimes that if a resident has been convicted of X in the past, then the tenant will not be permitted to live in your home. And this criteria should be communicated to all future residents and current residents. Okay, next we will talk about lease agreements. So, recovery housing operators will enter into lease agreements with all of their tenants. All leases must meet certain requirements under [00:17:00] the law to be fair to both parties and to be valid. Resident leases, as we just alluded to on the previous slide, are mutually agreed upon documents that must have certain elements to be legally enforceable. Broadly, there's a quid pro quo between tenants and residents and operators and landlords. A tenant agrees to pay rent when due every month. In exchange, the landlord agrees to provide a safe and clean space to a tenant.

This quid pro quo, or exchange, validates the lease and makes it legally enforceable for both parties and by both parties. Leases can have terms that are unique to recovery housing. For recovery homes,

landlords may impose and tenants must comply with house rules. The most popular one we see is that tenants must stay sober to remain living in the recovery home. [00:18:00] Last, and worth noting here, is that operators are prohibited from allowing their residents to waive their housing rights under federal and state laws. So you should absolutely check and look for waiver language in your resident agreements and make sure that that language is not in there.

Daphne Kackloudis: And one note, in addition to, of course, wanting your lease agreements to have terms in it that protect you, the landlord, and the protected tenant, of course, that's important. And, um, ensure that your lease agreement includes language. That, um, is specific to the type of resident you intend to have in the recovery home. So just the other day, in fact, we have a recovery housing operator and SUD treatment provider, both, um, client in Ohio, and, uh, there was a question within the organization about whether they could rent, um, essentially a vacant um, a [00:19:00] spot that's vacant in a recovery home to someone who is not in recovery. And we're thinking about it and we thought, well, but your lease says that the, that your residents have to, um, be actively in treatment and there are other rules, of course. So, that's just an example that if you want to ensure that your space is being rented only to people in treatment, that that of course should be in your lease. It should be in there for other reasons as well, but that will help sort of ensure that, uh, that that is the population that you'll be renting to.

Jordan Burdick: Okay, this slide sets forth the terms that at a minimum your leases should have. Um, including, for example, the name of the operator, the address of your recovery home, the name of the resident, the length of the agreement, the list of recovery supports that you as an operator will provide, language that makes it clear for residents that they have opportunities to make informed and free choices [00:20:00] about who they will engage with to receive recovery supports. So this is a really important point that we like to emphasize. Your tenants should have free choice of clinical providers for substance use disorder treatment.

Daphne Kackloudis: And in fact must have free choice under the Medicaid, federal Medicaid statute.

Jordan Burdick: Right. That is important. So this language, um, and the resident agreement as a whole needs to contemplate. Thank you very much. Um, the lease should also set forth rent, so how much rent is, when it's due, what happens if tenants are late on payments. Um, it should also set forth a statement of residence rights, house rules, grievance procedures for residents that want to bring forth a grievance, and it should contain the signature and the date of signature for both you as an operator slash landlord and for your resident slash tenant. And at this time, I'm going to kick it back over to Daphne to discuss the interplay between housing and treatment in recovery homes.

Daphne Kackloudis: Thank you, Jordan. So, Jordan did [00:21:00] a great job laying out the rights of landlords and tenants in the context of fair housing laws and lease terms. Um, we probably should have called that beginning part of our presentation. Um, landlord, tenant, recovery, housing, potpourri, I don't know, miscellaneous information that is important. It, of course, does not cover all of the regulatory. Framework that you as recovery housing operators and SUD treatment providers should know about, but some that are specifically adjacent to the topics we'll be talking about today. We wanted to be sure to cover those 2 topics, because they apply universally to housing operators. The topics that I am going to cover pertains specifically to SUD treatment providers. So if you are only a housing operator, you should definitely keep listening. Don't turn us off. Um, but know that the next section that we'll be talking about does not apply to you.

And if you do not also own or run a treatment business, so that's just an important thing to keep in mind. Um, 1 unrelated thing to also point [00:22:00] out is that your state may have laws, probably has laws, that specifically govern recovery housing. Ohio does, for example. Um, those laws discuss

certification, expectations for housing operators, registration requirements, et cetera. We don't cover those, uh, types of laws today because there are states that don't. specific, but we do encourage you to check them out. I think Jordan said that as well. Um, we will be moving on to a discussion about compliance for recovery housing operators that also offer treatment services. And the headline, as Jordan has said a few times, is that residents who are also patients must have a choice as to treatment provider.

And you, as a recovery housing operator that also runs an SUD treatment program may not impermissibly benefit from their treatment by steering them from your residence to your treatment services. And I know when you hear that, you probably think that does seem illegal. If someone's steering a patient from housing to treatment, that does seem illegal. That is true. Um, also, sometimes it happens in ways that aren't nefarious, [00:23:00] that don't seem like, um, steering a patient from treatment to recovery housing, or vice versa. Um, so we'll be talking about things today that you should be looking for, thinking about as you're, as you're, um, as you're contemplating how your programs are set up. Um, there is also a whole additional category of considerations for recovery housing operators who also run treatment programs in terms of safeguarding protected health information, um, complying with both HIPAA and 42 CFR Part 2, and a bunch of other things that we did not go into today, but we're working with the Fletcher Group for a future date.

So there is, we do a whole other presentation on, um, HIPAA and 42 CFR compliance, um, so we, we. That's something that we, um, have contemplated the Fletcher Group. We can do that as well. We're not specifically talking about that today, though, if you have questions, we're happy to answer those. We are now going to look at a few federal laws that prohibit a treatment provider from inappropriately inducing a recovery housing resident to also get treatment at the operators related treatment business.[00:24:00]

All the things we're about to discuss in this section pertain to treatment providers specifically. Okay, fine. Next slide. Thank you. Without further ado, um, okay, it is not per se inappropriate, uh, talk about a legal term per se inappropriate, meaning just sort of on the face of it's not per se inappropriate or illegal for recovery housing clients to also receive SUD treatment services from a treatment provider that is owned by or affiliated with the same company, though patients and clients must be free to choose their providers and the treatment program cannot impermissibly benefit from referrals of housing clients to avoid violating the federal anti kickback statute. We call the AKS, the Eliminating Kickbacks and Recovery Act, or ECRA, and the Civil Monetary Penalties Law, CMPL, um, treatment providers should implement certain processes, which we'll discuss after we give an overview of the laws.

In some industries, in most industries, uh, in most businesses, it's [00:25:00] acceptable to reward those who offer business to you or refer business to you, but when it comes to federal health care programs like Medicaid, Medicare, and TRICARE, that is not the case. The federal government is not interested in a treatment provider referring business to a housing operator or vice versa. Simply stated, paying for referrals in the health care space is a crime. Um, what we're worried about here, what the government is worried about here, is the recovery housing provider financially benefiting by inducing its clients to seek treatment at its own treatment business without giving the client a chance to choose the treatment provider.

The federal anti kickback statute is meant to not just protect a client's choice of provider, but also discourage referring clients for unnecessary treatment services paid for by Medicare and Medicaid or TRICARE. Um, doing that could endanger clients and increase costs to the federal government, right? So the bottom line is that the federal government, paying for all of Medicare and part of Medicaid, um, thinks if [00:26:00] there's an impermissible inducement to get someone into treatment, they

might not need the treatment. They might not need as much treatment as the housing provider says they need. Um, and if they're getting this extra treatment, it's causing, it's costing the federal government money.

So that's kind of the, uh, the background behind the Anti Kickback Statute. Um, the criminal provisions of the Anti Kickback Statute are violated when something of value is knowingly and willfully provided with the purpose to induce referrals. For example, it's illegal to offer free recovery housing as an incentive for patients to undergo SUD treatment at their affiliated facilities, even if you don't mean it as an incentive. Um, one recent example, the government filed a complaint against a provider called Bournwood Health Systems and First Psychiatric Planners, FPP, for offering free sober housing, which is remuneration. We talked about, um, that's in the definition of the anti kickback statute. To induce SUD patients to choose, uh, them over other [00:27:00] treatment facilities, and that violates anti kickback statute in the False Claims Act, um, and also state law in that specific instance.

In addition to the anti kickback statute potentially giving you problems, the Federal False Claims Act, or FCA, makes it illegal to submit claims for payment to Medicare or Medicaid that you know, or should know, are false or fraudulent. Uh, the fact that a claim results from a kickback. So, if you are, um, you know, receiving a kickback because you're a recovery housing provider and you're referring to your SE inappropriately, referring to you, to your SUD treatment program, and then you're billing your state Medicaid agency, let's say for that SUD service, um, the fact that that claim results from a kickback may render it false or fraud fraudulent, which creates liability under the Federal False Claims Act, as well as the Anti-Kickback statute. Um. And one thing to note is that many states have their own versions of an anti kickback statute that sometimes extends the reach of the federal anti kickback [00:28:00] statute from just federal health care programs like Medicaid or Medicare to commercial insurance as well. So, definitely check your state fraud and abuse laws as well.

Okay, next slide please. All right, now we're talking about ECRA. ECRA is similar to the anti kickback statute, but it applies to all payers, not just federal payers, and specifically mentions recovery homes, so you get a shout out in federal law. Um, ECRA prohibits all of the following. One, soliciting or receiving any remuneration directly or indirectly in return for referring a patient or patronage to a recovery home, clinical treatment facility, or lab.

Number two, paying or offering any remuneration, including a kickback, a bribe, or a rebate directly or indirectly to induce a referral of an individual to a recovery home, clinical treatment facility, or lab. There are also, um, prosecution under ECRA is big in the lab space. And 3, paying or offering any remuneration, uh, directly or indirectly in exchange for an individual using the services at a recovery home, clinical treatment facility, or [00:29:00] lab. Um, there's currently no interpretive guidance by the DOJ or HHS for ECRA, which is not at all helpful to you. Um, many of the cases alleging violations of ECRA involve labs. Uh, that case I just mentioned in Massachusetts, uh, uh, probably also should have been, could have been, um, prosecuted under ECRA. Um, the penalties for violating ECRA are big.

Fines of not more than, so don't worry, limited to $200,000 and or imprisonment for up to 10 years rate violation. Big, big fines under the Anti Kickback Statute and ECRA. Next slide please. Providers who are found to have violated the anti kickback statute or engaged in other bad behavior may be subject to civil, civil monetary penalties and sometimes exclusion. So meaning you can't participate in the Medicare or Medicaid program anymore. And the civil monetary penalties law basically adds more fines for engaging in prohibited behavior. So you can have fines under the anti kickback statute itself um, under ECRA, plus fines, uh, for the, [00:30:00] under the Civil Monetary Penalties Law.

And under the False Claims Act, if you, um, submit a claim that is fraudulent, sort of on its face, if you submit that claim to Medicaid or Medicare. Okay. Enough of that doom and gloom. Um, in addition to complying, because it's the right thing to do, a major motivation, as you can imagine, to comply with the laws we just discussed is to avoid significant fines, jail time, and exclusion from Medicaid and Medicare. Um, if you are a treatment provider not being able to bill Medicaid and Medicare, particularly if you're um, serving, um, underserved or uninsured or underinsured populations is incredibly problematic to you. Um, next slide, please. Okay, um, operating as you've probably picked up on, operating a recovery home and operating an SUD treatment program, each individually carries risks.

We talked about some of those. But entities that operate both the recovery home and a treatment business face those individual risks, So you've got, you know, risks in this bucket, plus risks in this [00:31:00] bucket, and additional risks related to the referral of business between the two, as we talked about. Um, as I said, it's not inherently illegal to operate both businesses and to serve individuals in both programs. That's okay. Um, but there are specific things you should avoid doing and we'll help you flag those practices and ideally steer you clear of them. Next slide, please. This slide really sums up the potential concerns, um, at least in the eyes of the government. So, running a dual recovery housing SUD treatment operation creates a greater risk of kickbacks and inducements than just providing SUD treatment services or recovery housing.

The provider you might be, you, provider of SUD treatment services, might be incentivized to steer housing residents towards your own treatment services to maximize revenue. Tying housing services or reduced housing costs, although we'll talk about that later, to SUD treatment services, um, at your, you, the dual operator at your sites, um, could be seen as a kickback. And additionally, not giving residents a free choice of [00:32:00] provider is impermissible under the Medicaid law. Okay, as I said, enough doom and gloom, uh, lawyer talk. Let's get into some practical guidance for structuring related recovery housing and SUD treatment programs. Okay, first, I just want to acknowledge that I said this earlier, but you don't have to have bad intentions to actually violate federal law.

If you know or should know that your arrangement might violate the Anti Kickback Statute or ECRA, and you don't take steps to mitigate those possible violations, you may be held liable. Um, I also acknowledge that compliance is time consuming and sometimes costly. Um, Jordan and I actually serve as, um, together, um, half a person plus half a person, um, as the Chief Compliance Officer for a recovery housing provider, um, and a good portion of our day is spent thinking about compliance, even in addition to our regular legal work for recovery housing providers, SUD treatment providers, other kinds of providers, [00:33:00] um, the compliance concerns.

Specifically, take up a good portion of our time. So we know that compliance is time consuming and costly, or could be costly. Um, and when you have limited resources, including time and money, um, and competing interests, compliance sometimes just is moved to the back burner. We get that. Um, we hope that the tips we give you today, though not legal advice, as I said, um, can help get you on the path to compliance. So what we really want to do is, I hope we didn't scare you. It was kind of goof and gloom there for a while. Um, but we want you to be able to spot something that seems like it could be problematic. And then just to think through, based on what we talk about today, whether it is problematic. And if it is, is there a way to mitigate that risk?

So we want to help get you on the path to compliance, or if you're on the path to compliance, that's great. We want to help keep you there. Um, lastly, I also acknowledge that there are just some plain old bad actors out there who are scheming to grow their business [00:34:00] on the backs of people with SUD and housing needs, but I do believe that those people with bad intentions are in the minority. The vast majority of times when Jordan and I deal with compliance problems on behalf of

providers, it is providers who, who either think they set up their programs legally and compliantly or didn't think about it much at all and then later realized that that is not the case. Okay, I'm going to move to this next slide.

You know why compliance is important. It's expensive. You could lose your license and you could be excluded from Medicaid and Medicare. Next slide, please. All right. Okay. So now, you know about the Anti Kickback Statute and you know about ECRA. And you know what can happen if you violate them, bad things. Um, to avoid finding yourself in hot water, here are some tips, um, and some steps that treatment providers should take to remain clear of liability. Okay, first, well, I said treatment providers, but this also applies to recovery housing providers. The first is charge fair market value rent to each [00:35:00] recovery housing client, regardless of where they receive treatment services.

So charge fair market value rent is kind of one headline. And we're going to come back to. We're going to come back to something. So charging fair market value rent, we know, doesn't mean that your residents will pay fair market value rent, but charging fair market value rent to each recovery housing client, regardless of where they're getting their treatment services, is really important.

So, under federal laws, requiring rent only, requiring rent period, whether, you know, regardless of what it is, um, requiring rent period only from individuals not participating in your treatment, um, could lead a challenger, a whistleblower, for example, um, that's attempting to show that the affiliated recovery housing operator had unlawful intent by arguing that if the sole purpose of offering reduced cost housing were truly to facilitate effective treatment, then it wouldn't matter where the person is getting their treatment.

They would offer that free rent to everyone. Additionally, offering free rent could be considered remuneration under the Anti [00:36:00] Kickback Statute and ECRA. Instead. Instead of just giving free rent to some people, those people who are getting your treatment services, or everyone, um, you, you should develop a financial need policy, um, and a procedure to assess all your housing clients, not just those who receive treatment from your own treatment provider, all your, um, housing clients for financial discount off their rent. For each housing client, not just those who are receiving treatment from your affiliated treatment provider, Each resident should complete a thorough and standardized review of financial need. If it's determined based on the objective financial criteria that provider establishes that a housing client cannot afford to pay rent, which I'm sure is the case in many, many instances, most instances, probably, then you can provide a discount in accordance with your financial need policy and procedure.

Um, we have a client that [00:37:00] has essentially like a sliding fee scale for rent based on the federal poverty guidelines, and then it kind of has tiers. So, you know, 0 to 100 percent of the federal poverty guideline, your discount is a percentage of the rent charge, for example, and then in bands like that up to, I think, 400 percent of the federal poverty level. Recovery housing operators should be mindful of the Anti Kickback Statute and DECRA when you're offering any form of financial assistance, including stipends to recovery housing residents that also seek treatment services. So we've had recovery housing clients that wanted to provide a stipend, um, sort of in recognition of, the inability of their residents to pay for, um, housing. Uh, rent stipends could be considered remuneration and probably would be considered remuneration under the Anti Kickback Statute in ECRA.

Um, if residents are paying less than fair market value for rent while they're participating in treatment, it could appear that the operator is offering free or reduced housing in exchange for, uh, [00:38:00] clinical or medical services. So you really have to do that financial need analysis for the housing component and SUD treatment as well, for each person, every time. You can't just give a blanket like everyone's getting free rent because, or everyone in our treatment is getting free rent. Um, financial

assistance should be offered only after and on the basis of true financial need. Individualized, good faith assessment of financial need. Don't just give, you know, free run out to anyone who walks in the door. Additionally, for each housing client, you should complete a thorough clinical assessment. That guidance is especially important in situations where the recovery housing provider might encourage their clients not to work while they're in treatment.

Right? So maybe you have some sort of tiered based treatment in residential housing categories. And maybe 1 of the tiers is, you know, So, um, intensive in, in terms of treatment and recovery that, uh, the recovery housing operator is recommending that the, that the client not work, [00:39:00] um, the clinical assessment should reflect that the clinical treatment need is so great that maintaining employment is unadvisable. And then you should periodically reevaluate each client's clinical need for housing and the level of financial assistance they're receiving. Please ensure that fair housing is not stated or even implied on your website or advertisement, um, if you're also providing SUD treatment. Develop a policy that describes the purpose of the housing program and discusses applicable laws and prohibitions, right? You want, you want to know what the federal law says, you want your staff to know what the federal law says, and really you want your clients at the end of the day to know what the law says as well.

And then establish a compliance hotline where employees can bring concerns to management or leadership to avoid potential whistleblower issues. Additionally, the few cases that have been prosecuted under ECRA show that ECRA is targeting providers that effectively reduce a patient's free choice of provider. This is really important. I know we've talked about it [00:40:00] already ad nauseam, but it's important. And I'll tell you why. If the only way for a resident to remain in housing is to get clinical treatment at the affiliated recovery housing operator, then that effectively removes a patient's ability to choose their own provider.

Additionally, an argument could be made that the affiliated recovery housing operator is providing remuneration in the form of financial need to induce residents to use the provider's clinical services, which is a major concern under both the Anti Kickback Statute and ECRA. So, to mitigate the risk, Affiliated Recovery Housing Operators should treat residents who are getting treatment at the affiliated recovery housing operator and residents who are getting their treatment elsewhere the same as much as possible. Additionally, financial assistance should not be automatically available to individuals who choose the affiliated recovery housing operator. Recovery housing and treatment services, but should be based on a finding and financial need. And that should be true of everyone who's getting housing and treatment.

And you should charge for fair market value rent. [00:41:00] Determine need based on the federal poverty guidelines, for example, and tie the discount to both. Right? So have there be some relationship between the discount and what they're actually paying. I'm going to do a time check. Okay, we're rounding third here. Um, just a few reminders for compliance with some of the topics Jordan covered earlier and some, again, kind of back into the potpourri section. Um, other, uh, things that come to mind when we're thinking about compliance, specifically in this space, um, maintain policies and procedures that align with federal and state law as well as best practices.

We just did a comprehensive, Jordan just did a comprehensive analysis of our recovery housing providers Policy and Procedure Manual, and, um, it's, it's really important to do that, not all the time, because. You would never leave your desk, um, but not infrequently. At least, you know, maybe take the time now to do it. Now [00:42:00] that it's fresh in your head, think about how your policies and procedures are supporting your ability to comply with federal and state law. And remember that we're only looking at a sliver of compliance today. There's so many more federal and state laws that you need to comply with, um, and that your policies and procedures should address.

HIPAA Part 2, employment laws, CARF standards if you're a treatment provider, Medicaid and Medicare laws. There's just so much out there. We're just looking at one sliver today. Uh, next slide, slide please. Thank you. Um, this, obviously, you know this better than we do. Our laws in Ohio actually say this. Your laws perhaps say it as well. Ensure that the expectations you have for your clients are clearly communicated to them, which also just seems like a matter of fairness. If you're expecting people who live in your recovery homes and are receiving services from you to maintain certain standards, and you should communicate those standards to them.

And there also should be mechanisms for bi [00:43:00] directional dialogue with the resident, right? The resident should have the ability to communicate back to you, um, whether those standards are working or not working, where there might be challenges. Um, and and the goal really, of course, is for you to have a bidirectional dialogue. Um, residents deserve and need to understand what's expected from them so that they can follow the rules um, make it clear orientation and your policies and your intake and your welcome packets, um, or maybe putting posters up in your recovery homes and maintain an open line of communication and 2 sided expectations.

Next slide. Thank you. Um, in addition to ensuring that residents know what is expected of them, they should know their rights. You, that's also probably, um a regulation in your state for recovery, um, housing recovery homes, um, resident right policies, uh, you should maintain a resident's rights policy and a procedure for addressing residents concerns. And that [00:44:00] policy should also include how you will address those concerns. That is, um, that's the right of a resident to know not just how they can complain to you, but how you're going to fix it. If, if it's found to be something that you should fix, how are you going to fix what they're complaining about? Uh, next slide, please. Um, last, when in doubt, uh, check your state's recovery housing resources.

Um, honestly, you know, we look at laws from states all over the country. They're not all easy to, uh, um, to access or to read, but if they, well, you should still try, first of all, second of all, even if they're not easy to read, um, you should still try to use those laws and regulations as a good outline, at least for the things you should be thinking about. Also check your state's recovery housing resources. Um, NARR and additional resources like the Fletcher Group are super helpful for you to to get a good sense about how you should be setting up your [00:45:00] programs and the things that might be, um concerning from a compliance perspective, and then how to fix those.

For treatment standards and regulations and best practices, check your state's behavioral health authority and your Medicaid department websites. Make relationships with regulators in your state. You know, get to know the people in the behavioral health authority or the Medicaid department in your state. Rely on resources like the Fletcher Group, as I said. Become acquainted with a lawyer, honestly, or someone who understands public policy in your state who can help you navigate the extremely complex sets of regulations that bind you. Ask questions, you know, um, you can ask us questions today, you can always call us, um, you can get in touch with the Fletcher Group, they can help put you in touch with us.

Um, I know it seems expensive, I mean it can be expensive, um, and it seems kind of like something you shouldn't need, uh, but we or other lawyers that really know this stuff can at least point you in the right direction. We do that all the time. We don't, you know, [00:46:00] need to do the work for you, if you're willing to do it yourself, we'll just point you in the right direction. We'll tell you where to go because there are lots of resources out there that can help you understand how to navigate these really complex regulations. That's it. We're happy to take questions.

Jordan Burdick: And here's our contact information. Should you have any questions and want to reach out to us, please feel free.

Janice Fulkerson: Well, thank you for that. We do have quite a few questions that have come in, so I'll try to capture them and maybe we can cover them in a couple of groupings. So, regarding the gloom and doom and ECRA, Um, does that apply to providers, recovery house providers and others, who are not accepting or billing Medicare or Medicaid?

Daphne Kackloudis: Well, I'm going to answer this in 2 different ways. Well, I'm going to, I'm going to give you an answer and then I'm going to explain it. Um, and Jordan, obviously, feel free to jump in anytime. [00:47:00] ECRA applies to, um, recovery homes, um, and a variety of other providers. It's specifically named in the law, which is, um, a little unusual.

It's different than most other federal laws. Uh, so it applies to recovery homes and it applies to, um, commercial insurance in addition to Medicaid and Medicare. So hard to say from the question whether the, whether the, the person asking the question wants to know about whether it applies to insurance in addition to Medicaid and Medicare or whether the question is more specifically about recovery homes. But hopefully that's helpful. If not, feel free to ask a follow up question and we can provide additional information.

Janice Fulkerson: I think it was related to if a recovery home doesn't bill insurance or Medicare or Medicaid. I think it was that.

Daphne Kackloudis: If they don't bill Medicaid, Medicare, or insurance, Then ECWR does not apply.

Janice Fulkerson: Thank you. Um, [00:48:00] okay. So what about the inverse? Uh, the question comes if it's an IOP provider and, um, uh, intensive outpatient provider that refers to their own recovery residence, uh, in a hub and spoke model. Um, where, you know, they're, uh, it's the inverse and not the treatment referring to the recovery house, but the IOP referring to the recovery residents. Does that make a difference with ECRA?

Daphne Kackloudis: Yeah, I don't think it makes a difference under ECRA or the anti kickback statute. I think the, the the general gist is that if the, if the relationship could result in increased services or reimbursement from federal programs, like Medicaid or Medicare, [00:49:00] then that's where we, that's what we want to, what the government is sort of focusing on. So if it's, you know, if it's kind of going back and forth, I think you want to you know, between treatment and housing, I think you want to evaluate that relationship sort of in totality. And again, just having that relationship itself is not illegal or inappropriate. You just have to kind of monitor how that, how that works.

And you want to give, you know, the most important things are giving the client the free choice of provider, letting them know they can go to treatment elsewhere, they can get the recovery housing services elsewhere, um, and then essentially not, not removing that choice by making, um, you know, the service free, which would really, really would compel them to stay in that treatment service. Yeah, Jordan, do you have anything else?

Jordan Burdick: I agree. I think the inverse is true here because ACRA does cover recovery homes and also clinical treatment providers. So referrals back and forth [00:50:00] from either to either would be covered by the law.

Janice Fulkerson: Terrific. So freedom of choice is critical in this. Here's a list. Here's the one that might be affiliated with a particular entity. Here are other options.

Jordan Burdick: Yeah.

Janice Fulkerson: Okay. Um, here's one, um, uh, as a best practice. Using a program fee versus rent, and this was a question that came up last month as well, um, does the verbiage make a difference? If I say I'm, I have like, a recovery house program versus a recovery house residence. Do you see a difference in program versus rent?

Daphne Kackloudis: That's a good question. And I am recalling that one of our clients uses the term program fee or something like that as well. You know, I guess, I don't know that the [00:51:00] term, it must be a term of art that is used in recovery housing generally, because I've seen it before. So, I'd be interested in learning more about the rationale for using it as opposed to rent. Um, I think the bottom line is that, It is that it is okay if a person ends up paying only a small amount to participate in a recovery home or to live in a recovery home, as long as there's a demonstration of financial need that is undertaken on an individualized basis. So, I guess it doesn't really matter. I'm sort of thinking through this. I guess it doesn't really matter if there is a lease agreement and it refers to some. You know, agreed upon amount. agreed upon amount. Um, and if that amount is reduced.

Jordan Burdick: According to your [00:52:00] financial need policy, so that's where it's really, really important to memorialize all of your policies in writing. Um, that way, you know, you're ensuring that you're following the same procedure for all residents, but in terms of the verbiage between rent and program fee, I don't think it does as long as it's set out clearly in that resident agreement, or at least, you know,

Janice Fulkerson: Yeah, and, um, there's so many ways that the question could go beyond that, you know, it's referred to a program and not a rent or lease so that fair housing doesn't apply or does apply or, you know, and I think at the end of the day, what I'm hearing you say is it's really based on intent and the regulations or best practices that may be applied to the entity. Um, if it's a recovery house. And it's somebody's residence. I think regardless of whether you call it a program or whether you call it a rent or lease, [00:53:00] those regulations will apply to the entity.

Daphne Kackloudis: I agree, and I think this is where it would be nice to have Brandon here because he could probably opine on this better than us. Um, but I guess a couple of additional thoughts. One, and Jordan, I'm interested in your opinion as well. One is that, um, the lease is enforceable as a contract, but also the terms in the lease are the lease um, sort of underpinned by common law principles. And so the lease itself is a contract and has, you know, the force and effect of a contract. But even if you don't have a lease, if you have something that that is essentially sort of a landlord tenant relationship, I don't think you can avoid application of fair housing principles. Yeah, but I'd be interested.

Jordan Burdick: I agree. I don't think you can circumvent state law requirements in the Federal Fair Housing Act because you're calling it a fee, a program fee versus rent.[00:54:00] So, anyway, these are just some additional thoughts.

Janice Fulkerson: Okay, well, thank you. Okay, a couple more questions. Related to fair housing, can a recovery center that maybe, say, has 30 to 80 units serve females, or, or males if they have government funding. And I think the clarification here is really related to gender equity. And if someone says, I'm getting federal grants or federal funding, but I'm only going to serve um, men, or I'm only going to serve women.

Daphne Kackloudis: It's a good question. I think I would 1st point the person back to their grant, the terms of their grant. I imagine that if there are prohibitions against, um, serving some subset of the population, it would be included in the grant. [00:55:00] Um, otherwise, I think, you know, based on need and based on the program itself, that seems to be permissible. So if the recovery program is set up as, you know, recovery housing for, you know, women in need in this particular geographic area, that seems to be permissible, but I would definitely check the terms of the grant. We can do some more thinking about that too.

Janice Fulkerson: Thank you for that. We have a very interested audience who will, uh, send in some of the hardest questions.

Daphne Kackloudis: I love that. This one is related to how you opened up, which is related to 42 CFR. Are there some recovery housing programs that don't have to follow 42 CFR confidentiality requirements? Even if they aren't required to, do you think these requirements should be followed as a best practice?

Jordan Burdick: [00:56:00] Yeah, so the answer to that is, it depends if you are federally assisted. So, if you receive federal money from the government, then yes, you are required to comply with part 2, and the 2nd piece to that is.

Daphne Kackloudis: And if you're providing SUD.

Jordan Burdick: Yes, sorry. Yeah, so federally assisted plus providing substance use disorder treatment. So some recovery homes may not have to comply with part 2, which opens us to the 2nd part of the question, which is should they? I would say best practice dictates yes. Not maybe to the extent of the law and the regulations requirements, because they are pretty stringent, but from a confidentiality perspective, which is the point of Part 2, you do want to make sure you have practices to really preserve your residents confidential information and their protected health information, which extends to demographic information, like their name and their address, name, address, date of birth, their insurance payer.[00:57:00]

Daphne Kackloudis: Yeah, and I'm thinking like. You know, Jordan, I think of this in specific ways, because we respond to subpoenas from all kinds of entities on behalf of our SUD treatment and recovery housing provider clients. And I'm thinking if you're not, if you're not technically bound by part 2, but you're implementing part 2 practices, and you push back against, for example, like, a law enforcement, um, law enforcement officer who's asking for the name and address of one of your residents. I find it hard to believe that they would know enough to push back against you because, you know, 99 percent of the time we're educating them on what Part 2 means. So, I think it's not a bad idea.

Jordan Burdick: And when we say pushing back, we mean going to them and saying, you need a court order for this information.

Janice Fulkerson: Perfect. Thank you. Okay. We have more ECRA um, questions that have come in. Um, so, um, what if individuals are aware of entry [00:58:00] into, um, a program that the service is bundled. Like, you know, the fee or the arrangement incorporates and includes bundled services that could include the housing, the IOP and other things. Um, and they agree to the bundling. How does ECRA apply to that?

Daphne Kackloudis: I, I guess I have a couple of thoughts. The first is that it's possible that in your state, there is some more like a residential level of, like an all inclusive, like a per diem. It's possible there's some sort of residential package of services that's included in a per diem that would permit that. But let's set that aside.

If it's not necessarily that, and it's, um, kind of as you described, I would be, I guess, some safeguards I would implement include certainly making [00:59:00] the client aware that they can get their treatment somewhere else. And then I guess that necessarily means that if a person says, I don't want this bundle, but I want the recovery housing, you know, can I pay, can I pay for or enroll in the recovery housing program separately? I want to get my treatment somewhere else. Um, I think you'd have to say yes, if you want to you know, continue to serve them because you really, you can't compel your recovery housing client to get their treatment services there.

Janice Fulkerson: Okay,

Daphne Kackloudis: if it's being paid for by Medicaid specifically.

Janice Fulkerson: And I'm going to go down a rabbit hole with Makisha who asked the question. It would be a great, I think, research study if you had a population that was mixed and some were bundled and some weren't to see what the outcomes might be in a situation like that. That might be valuable information. Okay, I think we have time for one more [01:00:00] question and then our time will be up. Um, Lisa says, I haven't seen regulations promulgated by Department of Justice, HHS on ECRA. Do you expect them to promulgate regulations?

Daphne Kackloudis: It would be helpful. Who knows? Yeah, I mean, I don't, I don't know what they're waiting for. There was, I should have printed this one out. I don't know, Brandon actually, uh, was telling me there was a prosecution under ECRA. Maybe last week or something, uh, you know, we get the cases and so we're kind of left to use the outcomes of those cases, the facts of those cases as the guidance until we get actual guidance. I don't know what they're waiting for. Now, it'll be super interesting to see what happens. Um, now that the Chevron Doctrine has changed, I imagine that they will probably be. I can't imagine that it's going to be out anytime soon now that we've got this sort of [01:01:00] overturning of Chevron. Um, so I think we're kind of just stuck with what we know about, which is not very much. I, you know, you could, you could use the Anti Kickback Statute as kind of a similar framework, um, but we just don't know. It's a good question.

Janice Fulkerson: Thank you for that. Um, we did have one other question early on. Um, Caitlin asks, can you clarify the different states, um, regarding the rules provided by treatment services? Um, and recognizing Level 4 NARR. I'll just say that, you know, according to NARR, there are the four levels of housing, um, and Level 4 is recognized as treatment. And I would refer them back to their NARR affiliate if they have one in the state. And if they don't, I would recommend that they reach out to us with, um, some technical assistance. Um, and or reach out to the National NARR affiliate to talk about how that's really defined in their [01:02:00] states. What we're finding across the US is that that 4th level of recovery housing slash treatment um, it depends on how their state is.

Daphne Kackloudis: Yeah, I only know what Ohio's looks like, and it's the only level of Ohio that requires certification as a treatment service by our mental health authority. There is, you know, separate recovery housing certification also by our mental health authority, but that's really just for the housing. So, I only know how it works in Ohio, and it is, that is the most, that is the only one that requires certification as a treatment service.

Janice Fulkerson: Yeah, from their state authority. Yeah, we see a lot of states. Thank you so much for joining us today. Um, just want to let everybody know that, uh, this recording and related materials will be on our website later next week, um, along with all of our other webinars that, uh, we produce once a month. We hope you'll join us next month for another [01:03:00] really great webinar and, um, please fill out our survey as you exit the webinar, uh, the webinar today. Thank you both for being here.

Daphne Kackloudis: Thank you.

Jordan Burdick: Thanks for having us.