
A Practical Guide to Structuring Legally Compliant RH and SUD Services

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Introduction

- Who are we?
- What is BMD?
- Who are you?
 - Recovery housing only?
 - Recovery housing + SUD treatment?
 - How many residences?

Disclaimer

This presentation is prepared for general informational purposes only. It is not intended and should not be used for specific legal advice in a specific factual situation. Questions about the legal issues discussed in these materials should be presented to knowledgeable legal counsel with respect to any given factual situation before deciding on a specific course of action.

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Agenda

- Objectives, History, Context
- Recovery Housing v. SUD Treatment
- Fair Housing Laws
- Lease Agreements
- Interplay Between Housing and Treatment
- How to Structure Compliant RH and SUD Services
- Questions

Objectives

- Review the relevant fraud and abuse statutes and rules that apply to recovery housing and substance use disorder treatment services.
- Learn how to structure recovery housing and substance use disorder services so they comply with various federal fraud and abuse laws.
- Provide tips for providers and organizations to follow when furnishing recovery housing and substance use disorder services.

Universe of Regulatory Authorities

- Recovery Housing Laws (state)
- Fair Housing Laws (federal and state)
- Landlord-Tenant Laws (state)
- Lease Agreements (common law)
- Anti-Kickback Statute (federal)
- Eliminating Kickbacks in Recovery Act (federal)
- Civil Monetary Penalties Law (federal)

Our presentation today will focus on federal laws.

Be sure to check your state's laws AND regulations as well.

The Need for Recovery Housing in Rural Communities

- **High Prevalence of People with Substance Use Disorder**
 - Rural areas often have higher rates of substance use and less access to treatment facilities.
- **Limited Resources**
 - Rural communities frequently face shortages in behavioral health providers, making it more challenging to access SUD treatment.
- **Importance of Stable Housing**
 - Recovery housing provides a stable and supportive environment that is crucial for long-term recovery from SUD.

Recovery Housing vs. SUD Treatment

- **Recovery Housing**
 - Provides a safe, supportive environment for individuals in recovery from SUD.
 - Emphasizes peer support, accountability, and sober living.
- **SUD Treatment**
 - Clinical and medical services, such as detoxification, therapy, and medication-assisted treatment, aimed at treating SUD.
 - Recovery homes may offer SUD treatment, but they don't have to and many do not.
 - SUD providers bill for services whereas recovery housing operators do not bill insurance but (should) charge rent.
 - The risk of operating a recovery home *and* SUD treatment center is elevated for entities that do both.

Fair Housing Laws

Fair Housing Laws: Protections

- The federal Fair Housing Amendments Act of 1988 provides fair housing protections to individuals with disabilities in virtually every housing activity or transaction.
- The law prohibits discrimination because of any of these protected characteristics:
 - Race
 - Color
 - Religion
 - Sex (including Sexual Orientation or Gender Identity (LGBTQ+))
 - National Origin (country of origin or ancestry)
 - **Disability** (a physical or mental impairment that substantially limits an individual's major life activity or bodily function, being regarded as having such an impairment, or having a record of such an impairment)
 - Familial Status (parent(s) or guardian(s) living with a child or children under age 18 or pregnancy)

Fair Housing Laws: Discrimination

- Federal law protects people in recovery from SUD from discrimination. The Fair Housing Act considers alcoholism and past drug use to be disabilities.
- All landlords (public and private) are required to follow fair housing laws and must treat residents fairly and equitably.
- Depriving people with disabilities of housing, discriminating against them in any way, or evicting them, constitutes **irrational discrimination** that may seriously jeopardize their continued recovery.
 - Note: federal laws do not protect individuals who are currently engaging in illegal use of drugs.

Fair Housing Laws: Accommodations

- Residents of recovery housing have the right to request **reasonable accommodations** or modifications to allow them equal access and opportunities.

Fair Housing Laws: Background Checks

- While federal fair housing law does not explicitly prohibit criminal background screening, the U.S. Department of Housing and Urban Development (HUD) released a 2022 memo, explaining how the Fair Housing Act applies to housing policies with regard to criminal background checks.
- HUD's memo recommends that private housing providers not use criminal history to screen tenants for housing.

Lease Agreements

Resident Lease Agreements

- Leases, housing, or resident agreements refer to written agreements between residents and owners/operators.
- The agreement must be written; in compliance with state and local landlord-tenant law, Fair Housing Laws, and non-discrimination policies; and legally enforceable by both parties.
- A lease is a mutually agreed upon document. Broadly, a tenant agrees to pay rent when due. In exchange, the landlord agrees to provide a safe and clean space to a tenant.
 - *For recovery housing residences*, landlords may impose, and tenants must comply with, house rules (including being sober).
- Operators are prohibited from allowing residents to waive their housing rights under federal and state laws.

Recovery housing residence lease agreements

- Should include, at a minimum:
 - The name of the operator, address of the property, and name of the resident
 - The length of the agreement
 - The list of recovery supports provided
 - Language that makes it clear that residents have opportunities to make informed choices about who they engage with regarding recovery supports
 - Clear financial expectations
 - Rent (how much, when it is due, what happens if payments are late)
 - Rent deposit (if a deposit is required, how much, when it is due, and when and how a resident can request their deposit back)
 - When and how the landlord operator may end the agreement; when and how the tenant resident may end the lease agreement
 - Statement of resident rights
 - House rules or resident expectations
 - Grievance procedures
 - Signature (and date of signature) of both the operator and the resident

Interplay Between Housing and Treatment

Anti-Kickback Statute

- The federal Anti-Kickback Statute ("AKS") is a criminal law that prohibits the knowing and willful payment of "remuneration" to induce or reward patient referrals or the generation of business involving any item or service payable by Federal health care programs (e.g., health care services for Medicare or Medicaid patients).
- Remuneration includes anything of value and can take many forms besides cash, such as free rent, expensive hotel stays and meals, and excessive compensation for medical directorships or consultancies.
- The statute covers the payers of kickbacks (those who offer or pay remuneration) as well as the recipients of kickbacks (those who solicit or receive remuneration). Each party's intent is a key element of their liability under the AKS.

Eliminating Kickbacks in Recovery Act

- The federal Eliminating Kickbacks in Recovery Act (“EKRA”) makes it unlawful to offer or solicit remuneration in exchange for patient referrals to **recovery homes**, clinical treatment facilities, or laboratories.
- EKRA is broader than the AKS because it applies to services payable by *all* insurers, rather than just federal payors.
- EKRA is a relatively new law with little precedent or regulatory guidance to help interpret its applicability. Therefore, the regulatory contours of the law and how stringently it will be enforced are still unclear.
- EKRA is used as a mechanism to target providers that effectively reduce a patient’s freedom of choice of provider.

Civil Monetary Penalties Law

- The federal Civil Monetary Penalties Law (“CMPL”) authorizes the OIG to impose financial penalties for a wide variety of fraudulent conduct.
- Some examples of CMPL violations include:
 - Presenting a claim that the person knows or should know is for an item or service that was not provided as claimed or is false or fraudulent;
 - **Violating the AKS**; and
 - Making false statements or misrepresentations on applications or contracts to participate in the Federal health care programs.

Why comply?

- Criminal penalties and administrative sanctions for violating the AKS include fines, jail terms, and exclusion from participation in the Federal health care programs.
- Under the CMPL, providers who pay or accept kickbacks face penalties of up to \$50,000 per kickback .
- Filing false claims may result in fines of up to *three times* the programs' loss plus \$11,000 per claim filed.

Compliance Risks for Dual Operations

- **Complex Regulatory Environment**
 - Entities operating both recovery housing and SUD treatment centers must navigate a complex web of federal, state, and local regulations.
- **Billing and Fraud Risks**
 - **Billing for Services:** SUD treatment centers bill for clinical/medical services, which can lead to billing fraud, such as overbilling, billing for services not provided, or providing unnecessary services to increase revenue.
 - These practices can result in violations of the Anti-Kickback Statute (AKS) and the False Claims Act (FCA) .
 - **Financial incentives** to steer residents toward affiliated treatment services can lead to conflicts of interest and violations of federal laws like the Eliminating Kickbacks in Recovery Act (EKRA) .

Kickback Concerns for Dual Operations

- Running a dual RH-SUD treatment operation creates a greater risk for kickbacks and inducements than just providing SUD treatment services.
- The provider might be incentivized to steer housing residents towards their own treatment services to maximize revenue, which can lead to violations of the AKS and EKRA.
 - Tying housing services (or reduced housing costs) to SUD treatment services at the dual operator's sites will be seen as a kickback.
- Additionally, not giving residents the freedom to choose their SUD treatment provider is impermissible under Medicaid law.
 - Residents who are also patients must have a choice as to treatment provider!

How to Structure Compliant RH and SUD Services

Importance of Compliance in Recovery Housing and SUD Treatment

Even well-intentioned Operators deprioritize compliance sometimes and violate federal laws. Why?

- Complex regulations; unwillingness to learn or lack of awareness about them
- Desire to raise census
- Resource constraints - prioritizing other things

Compliance Matters

- Non-compliance can result in severe penalties, including fines, exclusion from the Medicaid program, and even closure of the facility.
- Failure to comply with regulations can lead to the revocation of operating licenses.
- Non-compliance not only affects the organization legally and financially but also impacts the individuals relying on these services and/or stable housing for their recovery.

Tips for AKS and EKRA Compliance

- Charge fair market value rent.
- Develop a financial need policy and procedure for housing clients.
- Complete a thorough and standardized review of financial need.
- For each housing client, complete a thorough clinical assessment.
- Periodically re-evaluate each client's clinical need for housing.
- Ensure that "free housing" is not stated or implicated on any website or advertisement.
- Develop a policy that describes the purpose of the housing program and discusses applicable laws and prohibitions.
- Establish a compliance "hotline" where employees can bring concerns to management to avoid potential qui tam issues.

Reminders and Best Practices

- Recovery residences must have policies and procedure that align with all federal and state laws, including state recovery housing regulations, fraud and abuse laws, and fair housing/landlord-tenant laws.
- A recovery home should broadly:
 1. Maintain a drug- and alcohol-free living environment
 2. Maintain a resident driven length of stay
 3. Allow residents to have free choice of service providers
 4. Maintain a landlord-tenant relationship with residents

Reminders and Best Practices

- Residents deserve and need to understand what is expected of them from their operators and how they should be treated when living in your recovery home.
 - Make this clear in orientation, policies, and wall postings throughout the home.
 - Keep an open line of communication about two-sided expectations.

Reminders and Best Practices

- Residents' Rights policy should outline a process by which a resident can bring forward a concern, what you are committed to doing to address and respond to the concern, and how you will keep documents and records related to the concern.
- This policy should include clear timelines for both you and the resident related to grievances.

Guidelines for Recovery Housing Operators

- **NARR Code of Conduct:**
 - The National Alliance for Recovery Residences (NARR) establishes ethical standards for recovery housing operators. These standards include maintaining a drug-free environment, respecting residents' rights, and fostering a supportive community.
 - Operators are accountable that their actions and practices align with ethical guidelines. This includes transparency in operations, fair treatment of residents, and adherence to legal and regulatory requirements.
 - The NARR Code of Conduct emphasizes the importance of protecting residents' rights. This includes the right to privacy, the right to fair treatment, and the right to participate in their recovery plan.

Questions?

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