

# KNOW YOUR WORKPLACE LEGAL RIGHTS RELATED TO THE OPIOID CRISIS

**This fact sheet provides an overview of some of the key legal rights of workers regarding access to mental health and/or opioid use disorder treatment, recovery, and related workplace issues.**

## 1) Do health care insurance plans cover the costs of addiction treatment and recovery?

### Affordable Care Act (ACA)

- Expanded coverage for more people (Medicaid, exchanges).
- Many workers continue to have health insurance through work (about 50% overall and 99% for large employers).<sup>1</sup>
- Expanded guarantee of coverage for mental health and addiction services for all health insurance, including insurance obtained through work.
- Does not eliminate out-of-pocket expenses.

Under the ACA, there was an expansion of access and parity (equal coverage) for mental health and substance use treatment.<sup>2</sup> The ACA extends the 2008 Mental Health Parity and Addiction Equity Act, requiring insurers cover substance use disorder treatment equally to medical and surgical services.

Deductibles, copays, out-of-pocket maximums, treatment limitations, etc. for mental health or substance use disorders must be no more restrictive than the same requirements or benefits offered for other medical care.

Some states have expanded their Medicaid programs to cover all people with household incomes below a certain level.<sup>3</sup> An estimated 1.6 million Americans with substance use disorder have gained insurance coverage in Medicaid expansion states.

The ACA also extends coverage to adult children up to the age of 26 and bans insurers from refusing to sell insurance due to preexisting conditions. People with a prior treatment admission for opioid use disorder cannot be denied insurance.

## How can I evaluate coverage under my health benefits plan?

Workers who seek substance use treatment may use the questions listed below to evaluate barriers and options for treatment under their health insurance plan.

- 1) Are referrals or approval required before you enter treatment?
- 2) Which treatment centers are in-network and which are out-of-network?
- 3) Which specific treatment options are available under your policy? Will your policy cover the assessment? Detox? Inpatient or outpatient facilities?
- 4) What percentage of treatment will be covered?
- 5) What are your copayments and deductibles for each type of treatment?
- 6) How many days of inpatient or outpatient treatment are covered?
- 7) What is the out-of-pocket maximum on substance use disorder treatment?
- 8) What is deemed medically necessary by your insurance company and how is that determined?
- 9) Do I have different health insurance coverage for co-occurring conditions such as bipolar disorder, depression, post-traumatic stress disorder (PTSD)?

Consult with your state department of health or substance abuse agency to determine support services that are available to challenge insurance company decisions denying or delaying treatment.

**Note:** Workers who are disabled by work-related injuries or diseases may qualify for cash and medical benefits provided by state workers' compensation or federal workers' compensation programs. Each state has its own workers' compensation statute. Federal employees and several other categories of workers, including coal miners with black lung disease, are covered under federal workers' compensation statutes.<sup>4</sup> One important factor is whether the opioid was used by a worker as a result of a work-related injury or the worker's injury was caused by the opioid. If, for example, a worker's back is injured by an accident at work and a doctor prescribes an opioid during the healing period, the workers' compensation program will probably pay for a related substance use disorder. However, if the worker is injured at work while under the influence of an illegal opioid, the worker may not qualify for workers' compensation benefits.<sup>5</sup> Workers are well advised to consult a qualified workers' compensation attorney regarding these claims, which are handled differently under each program and can be quite complicated.

**What is medication-assisted treatment (MAT) and how can I evaluate if it is covered under my health insurance plan?**

U.S. Food and Drug Administration (FDA)-approved medications for treating opioid use disorders have been shown to be more effective for sustaining long-term addiction recovery than treatment without medication.<sup>6,7</sup> These medications include methadone, buprenorphine (Suboxone), and naltrexone (Vivitrol and Revia). MAT decreases opioid use, opioid-related overdose deaths, criminal activity, and infectious disease transmission.

The questions below are aimed at helping to determine whether a health plan will cover MAT for substance use disorders (SUDs). Each state's workers' compensation system may also have their own rules for providing MAT for SUDs.

To evaluate the access to MAT for substance use disorder coverage under your health insurance plan, ask your insurance provider:<sup>8</sup>

- 1) How is medical necessity for MAT determined?
- 2) Are all MAT medications covered and, if not, which ones are covered?
- 3) Is a copayment required?

**What is the Uniform Accident and Sickness Policy Provision Law (UPPL)?**

Since 1947, the insurance codes of 38 states have incorporated the UPPL, which includes the language:<sup>9</sup>

"Intoxicants and Narcotics: The insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered on the advice of a physician."

Four additional states have adopted provisional restrictions that enable insurers to deny payment for treatment of alcohol or other drug-related injuries.

Workers who need treatment in states that enforce this law may face an additional hurdle in gaining access to treatment.

## 2) Does an employer have to accommodate the needs of people in treatment and recovery under the Americans with Disabilities Act (ADA)?

The ADA establishes requirements for equal opportunities in employment, state and local government services, public accommodations, commercial facilities, transportation, and telecommunications for citizens with disabilities—including people with mental illnesses and addictions.<sup>10</sup> It is illegal for employers to discriminate against people with qualifying disabilities, including mental illness and addictions. However, the ADA does not provide protection for employees or job applicants who are currently using illegal drugs.

In order to qualify for protection under the ADA, the individual must be a qualified person—that is, someone who has a qualifying disability and who can do the essential functions of the job, with or without reasonable accommodation.

People who are recovering or recovered from addiction may qualify as disabled and may also be entitled to some accommodation on the job. However, obtaining remedies by filing discrimination complaints with the federal Equal Employment Opportunity Commission (EEOC) or state agency equivalent is often a lengthy process, cases are difficult to prove, and representation by a lawyer may be important.

### Is drug addiction a qualified disability under the ADA?<sup>11</sup>

An employee who illegally uses drugs—whether the employee is a casual user or an addict—is not protected by the ADA if the employer acts based on the illegal drug use. As a result, an employer does not violate the ADA by uniformly enforcing its rules prohibiting employees from illegally using drugs.

A former drug addict may be protected under the ADA because the addiction may be considered a substantially limiting impairment. However, according to the EEOC Technical Assistance Manual on the ADA, a former casual drug user is not protected.

The ADA does not contain a list of medical conditions that constitute disabilities. Instead, the ADA has a general definition of disability that each person must meet. A person has a disability if he or she has a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or is regarded as having an impairment.

People who have been successfully rehabilitated and who are no longer engaged in the illegal use of drugs or are currently participating in a rehabilitation program and are no longer engaging in the illegal use of drugs,<sup>11</sup> may be protected. Possible qualifying limitations can include:

- Attentiveness and concentration
- Decreased stamina or fatigue
- Executive functioning deficits
- Noncompliant behavior
- Stress intolerance

If someone is a qualified disabled person but needs accommodation to do the essential functions of the job, then the employer is required to work with the worker to find a reasonable accommodation. If someone is regarded, erroneously, as illegally using drugs, he or she may fit into the “regarded as having an impairment” category. In this case, the worker does not need any accommodation.

Note that under the ADA, employers are allowed to exclude employees from the workplace if the employee may constitute a direct threat to the health and safety of other workers or him or herself, and this issue is raised frequently by employers when they are dealing with workers with substance use problems. If the employer can successfully argue that an individual poses a direct threat that cannot be corrected through reasonable accommodation, the employer may screen out an individual, even if that individual has shown he or she has a qualifying disability.

### **When is the employer required to provide reasonable accommodations to an employee with a qualifying disability?**

If an individual qualifies under the standard for qualifying disabilities, the employer is required to provide reasonable accommodation in order to make it possible for the person to do the job—as long as, with the accommodation, he or she can do the essential functions of the job. Reasonable accommodation can include any change to a job, the work environment, or the way things are usually done that allows a worker with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other individuals in the workplace. This should be an interactive process, and the employer is not required to provide the accommodation that the worker requests. Again, any request must be to allow the worker to do the essential functions of his or her job. In general, reasonable accommodation does not include any requirement that an employer create a new job, although it may include transfer to a different vacant job. In the latter case, seniority provisions in a collective bargaining agreement will control job allocation.

The employer may say that the request would pose an undue hardship, which requires the employer to prove significant economic reasons for refusal. This includes providing reasonable accommodations if a worker cannot perform a safety-sensitive job due to legal use of prescription drugs.<sup>12</sup>

Under federal and some state laws, reasonable accommodations related to a worker with opioid use disorder might include:<sup>13</sup>

- Allowing an employee to take MAT drugs.
- Allowing an employee to attend support group meetings.
- Allowing an employee to take a time-limited leave of absence to attend treatment.
- Modifying a job to eliminate job components, as long as the individual can still do the essential functions of the job.

Examples:

- A nurse with substance use disorder went into treatment and upon returning to work was restricted from dispensing narcotic medications.
- A call center employee in recovery was experiencing stress due to her supervisor's aggressive approach to discussing job performance issues. The employee was assigned to a different supervisor.
- A production worker in recovery from substance use needed to attend counseling that was only available in the evenings. His employer excused him from overtime on the days he attended counseling.

The Job Accommodation Network (JAN) is the leading source of free, expert, and confidential guidance on workplace accommodations and disability employment issues. Contact info is below:

West Virginia University  
P.O. Box 6080  
Morgantown, WV 26506-6080  
Toll Free: (800) 526-7234  
TTY: (304) 293-7186  
Fax: (304) 293-5407  
[jan@askjan.org](mailto:jan@askjan.org)  
<http://AskJAN.org>



### 3) What are my rights to time off from work?

There may be limited rights to time off from work as part of the reasonable accommodation provided under the ADA. In addition, there are several rights that individual employees may have in order to take time off for addiction treatment and recovery:

- The Family and Medical Leave Act is a federal guarantee of unpaid leave and right to return for a serious health condition or to care for a family member with serious health condition. Employer size and employee tenure requirements need to be met. A worker's claim must be supported by documentation from their medical provider.
- State and local sick leave and paid sick leave guarantees.
- Sick leave and leaves of absence under collective bargaining agreements.

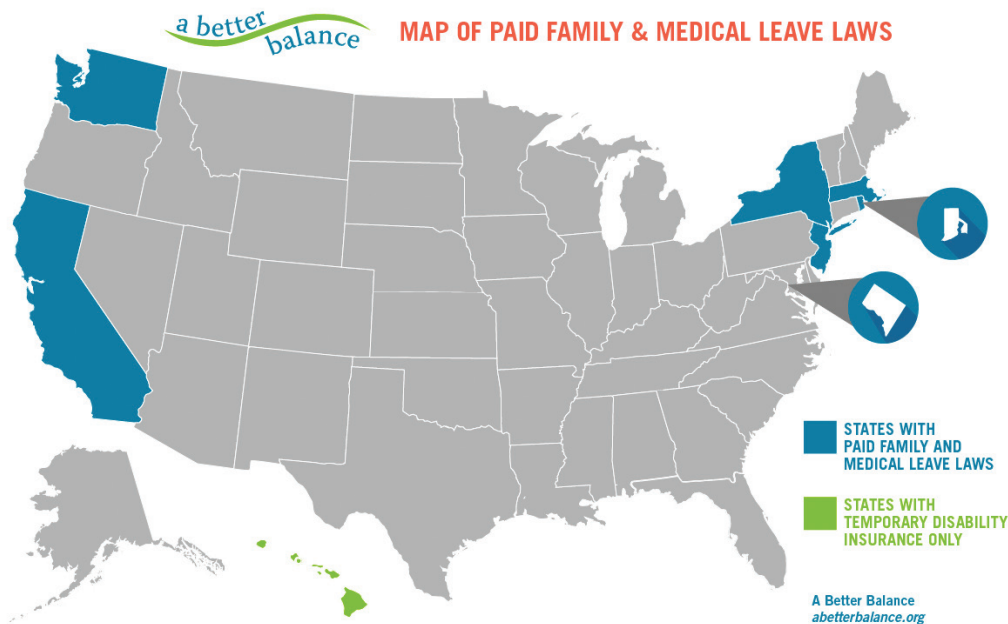
#### **Ten states and Washington, D.C., have sick leave laws and regulations.<sup>14</sup>**

Access to sick time is key when a worker is experiencing family or personal problems such as mental illness or substance use. There are no federal laws that require employers to provide paid sick leave for their employees. However, 10 states and the District of Columbia have enacted sick leave laws and regulations, as listed below. The provisions in these laws are varied, so it is important to review the specifics in the state in which you reside.

- 1) Arizona - Earned Paid Sick Time (2016 approved ballot measure)
- 2) California - Healthy Workplaces, Healthy Families Act of 2014 (AB 1522)
- 3) Connecticut - Paid Sick Leave Act
- 4) Maryland - Maryland Healthy Working Families Act (HB 1)
- 5) Massachusetts - Earned Sick Time for Employees (2014 approved ballot measure)
- 6) New Jersey - The New Jersey Paid Sick Leave Act (AB 1827; takes effect Oct. 29, 2018)
- 7) Oregon - Mandatory Provision of Sick Time (SB 454)
- 8) Rhode Island - Healthy and Safe Families and Workplaces Act
- 9) Vermont - Act 69 (H 187)
- 10) Washington - Paid Sick Leave (2016 approved ballot measure)
- 11) Washington, D.C. - Employee Sick Leave

#### **Paid family leave laws<sup>15</sup>**

As of February 2019, six states and the District of Columbia have enacted family leave laws, including California, New York, New Jersey, Rhode Island, Washington, and Massachusetts. This may be important for one's own self-care or the care of a family member. These laws augment the federal Family and Medical Leave Act.



Paid family leave provides job protection and paid time off to:

- Bond with a newly born, adopted, or fostered child.
- Care for a family member with a serious health condition.
- Assist loved ones when a spouse, domestic partner, child, or parent is deployed abroad on active military service.

Paid family leave also provides continued health insurance and protection from discrimination or retaliation.

#### 4) When can the employer conduct drug testing?

Almost all drug testing is lawful, and workers can be terminated for positive tests showing illegal drug use.

Tests may be performed:

- Before employment.
- Based on reasonable suspicion of impairment.
- On a random basis.
- When an employee returns after a positive test.
- On a follow-up basis after the return to duty.
- Post-injury or incident.



Key concerns include the quality of the tests, when and how often they are administered, and what actions are taken when a positive test is confirmed. The employer should follow reasonable procedures for taking and evaluating the specimen. In unionized workplaces, unions should ensure that proper procedures are followed and that the employer can prove that there is just cause for any disciplinary action. There is no federal statute that generally regulates employer drug testing. However, some states have drug testing laws.

U.S. Department of Transportation regulations require drug testing for transportation employees, including truck drivers, who perform designated safety-sensitive functions, including driving. Although these rules have no legal weight outside the transportation industry, they can be useful because they spell out all of the different requirements that any other drug testing program should follow.

In addition, there is mandated drug testing for federal employees under Executive Order 12564 and Public Law 100-71. The Federal Drug-Free Workplace Program is a comprehensive program required of all federal agencies. Key elements:

- Addresses illegal drug use by federal employees.
- Certifies executive agency drug-free workplace plans.
- Identifies safety-sensitive positions subject to random drug testing.

Additionally, there may be regulations covering government contractors and subcontractors, such as 10 CFR Part 707, which establishes workplace substance abuse programs at U.S. Department of Energy sites.

Managers need to know that the ADA may protect an employee's use of over-the-counter or prescription drugs to treat a disability. Such use should not be prohibited by a drug testing policy. If an employee notifies a manager that his or her use of legal medications may impair job performance, managers should be coached on how to engage and offer reasonable accommodations, up to or including modifying job responsibilities.

Although most federal agencies have employee assistance programs (EAPs) and provide some treatment options, the specter of stigma and discipline deter many workers from coming forward for help.

## 5) Can unions help?

### Do I have a right to union representation during investigatory interviews?

The U.S. Supreme Court ruled that unionized workers have the right to request union representation during investigatory interviews that may result in discipline. This is usually referred to as “Weingarten rights,” based on the name of the case.<sup>16</sup> Federal employees are entitled to equivalent rights.

The National Labor Relations Board (Board), in its July 31, 2014, decision in Ralph’s Grocery Co., 361 NLRB No. 9 (2014), ruled that “Weingarten rights” apply when employees request representation after an employer refers them for a workplace drug and alcohol test. Based on this ruling, the Board overturned an employee’s suspension and discharge, finding the actions were inextricably linked to the employee’s request for representation after referral for a drug test, and ordered a make-whole remedy.

### How can collective bargaining help?

Collective bargaining agreements (CBAs) may address drug testing, access to treatment, education and training, mental health and substance use benefits, and EAPs. Below are essential questions for unions and management in evaluating their mental health and substance use programs and policies as well as drug testing policies:<sup>17</sup>

- 1) Does the CBA provide adequate protection regarding when and how drug testing can be performed as well as the consequences of positive drug tests?
- 2) Are there adequate awareness, training, and organizational systems to help a worker who may be experiencing a mental health and substance use issue?
- 3) Do we effectively support a workplace culture that allows for open communication among workers, management, and union, and is free from stigma and discrimination?
- 4) Is there collective bargaining language that supports access to worker mental health and substance use treatment?
- 5) Do representatives know how to handle a disclosure of mental illness or substance use from a worker?

- 6) Does the CBA address reasonable accommodation?
  - a) Do our representatives participate in the development of reasonable accommodation plans for workers that address mental health and substance use challenges?
  - b) Do management and union representatives understand their role in helping to participate in and assist with the duty to accommodate?
  - c) Is there a Joint Accommodation Committee that collaborates on reasonable accommodations?
  - d) Is there a process in place to respond to a request to provide more evidence of the need for reasonable accommodation?
- 7) Does the CBA address individuals' needs to take time off from work (including to care for a family member with a substance use problem)?

## 6) Worker advocacy

- Keep copies of all documentation and take note of the times, dates, addresses, and names and titles of people involved, for all activities related to legal cases. Also note if the interaction was a meeting, phone conference, letter, text, or email. This information can be critical to a union grievance and arbitration or a legal complaint with an enforcement agency.
- You have a right to ask when communications and interactions are confidential and when they are not confidential. Also ask what the potential repercussions are when a communication is not confidential.
- If you are represented by a labor union, you should ask for representation by a qualified union representative in matters relative to the CBA. In matters before public agencies, you should seek the advice of a qualified attorney with expertise and experience in this area of law.
- Keep in mind that the legal landscape is evolving, and worker rights related to substance use issues are subject to change.

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## Endnotes

- 1 Joszt L. 2018. Percent of employers offering health coverage increases for first time since 2008. AJMC In Focus Blog, 31 August. Available: <https://www.ajmc.com/focus-of-the-week/percent-of-employers-offering-health-coverage-increases-for-first-time-since-2008>.
- 2 National Safety Council. The Proactive Role Employers Can Take: Opioids in the Workplace.
- 3 Abraham AJ, Andrews CM, Grogan CM, D'Aunno T, Humphreys KN, Pollack HA, Friedmann PD. 2017. The Affordable Care Act transformation of substance use disorder treatment. *Am J Public Health* 107(1):31-32.
- 4 The federal workers' compensation programs are described in: McLaren CF, Baldwin ML, Boden LI. 2018. Workers' Compensation: Benefits, Costs, and Coverage. Appendix B. Washington, DC: National Academy of Social Insurance. The report can be downloaded from [www.nasi.org](http://www.nasi.org).
- 5 In most states, the worker is not entitled to workers' compensation benefits if the employer can prove intoxication was a substantial or contributing cause of the injury. In a few states, such as New Jersey, the employee is entitled to benefits unless the employer can prove that intoxication was the sole cause of the worker's injury. In some states, the statutes include the use of illicit drugs as a basis for denying benefits. Larson indicates that in most states without explicit mention of illicit drugs, the courts have interpreted "intoxication" to include intoxication by drugs other than alcohol (Larson LK, Larson's Workers Compensation, Desk Edition § 36.03(9)).
- 6 Substance Abuse and Mental Health Services Administration. Medication and Counseling Treatment. Available: <https://www.samhsa.gov/medication-assisted-treatment/treatment#medications-used-in-mat>.
- 7 National Institute on Drug Abuse. Effective Treatments for Opioid Addiction. Available: <https://www.drugabuse.gov/publications/effective-treatments-opioid-addiction/effective-treatments-opioid-addiction>.
- 8 Substance Abuse and Mental Health Services Administration. Insurance and Payments. Available: <https://www.samhsa.gov/medication-assisted-treatment/treatment/insurance-payments>.
- 9 American Society of Addiction Medicine. 2005. Public Policy Statement on Repeal of the Uniform Accident and Sickness Policy Provision Law (UPPL). Available: [https://www.asam.org/advocacy/find-a-policy-statement/view-policy-statement/public-policy-statements/2011/12/15/repeal-of-the-uniform-accident-and-sickness-policy-provision-law-\(uppl\)](https://www.asam.org/advocacy/find-a-policy-statement/view-policy-statement/public-policy-statements/2011/12/15/repeal-of-the-uniform-accident-and-sickness-policy-provision-law-(uppl)).
- 10 Equal Employment Opportunity Commission. Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights. Available: [https://www.eeoc.gov/eeoc/publications/mental\\_health.cfm](https://www.eeoc.gov/eeoc/publications/mental_health.cfm).
- 11 See: Job Accommodation Network. Accommodation and Compliance Series: Employees with Drug Addiction. Available: <https://askjan.org/publications/Disability-Downloads.cfm?pubid=1280055>.
- 12 Abraham AJ, Andrews CM, Grogan CM, D'Aunno T, Humphreys KN, Pollack HA, Friedmann PD. 2017. The Affordable Care Act transformation of substance use disorder treatment. *Am J Public Health* 107(1):31-32.
- 13 Job Accommodation Network. Accommodation and Compliance: Drug Addiction. Available: <https://askjan.org/disabilities/Drug-Addiction.cfm>.
- 14 National Conference of State Legislatures. 2018. Paid Sick Leave. Available: <http://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx>.
- 15 National Partnership for Women & Families. 2019. State Paid Family and Medical Leave Insurance Laws. Available: <http://www.nationalpartnership.org/our-work/resources/workplace/paid-leave/state-paid-family-leave-laws.pdf>.
- 16 Deitchler D. 2014. Right to union representation applies to employer referrals for drug and alcohol tests, NLRB rules. ASAP® (Littler Mendelson, P.C), 3 September.
- 17 Workplace Strategies for Mental Health. Union-Management Cooperation. Available: <https://www.workplacestrategiesformentalhealth.com/free-training-and-tools/union-management-cooperation>.