
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
- Ohio Recovery Housing Laws
- Fair Housing Laws
- Landlord-Tenant 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 state and federal fraud and abuse laws.
- Provide tips for providers and organizations to follow when furnishing recovery housing and substance use disorder services.

History

- Recovery housing existed in Ohio long before it was officially recognized by the State as a valued housing choice/recovery support
- Desire to standardize service delivery and trainings preceded State recognition
- Recognition → Regulation → Investment of resources

Universe of Regulatory Authorities

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

Ohio Recovery Housing Laws

ORC 340.032 Establishment of community-based continuum of care

- Requires each ADAMH board to establish a community-based continuum of care that includes, among other things, "a wide range of housing and support services, including **recovery housing residences**" as a "recovery support"
(A)(8)(b)

ORC 340.034 Recovery housing

- Requires recovery housing residences to comply with the requirements to be monitored by OMHAS (but does not require not residential facility licensure) (A)
- Requires recovery housing residences to have protocols for all of the following:
 - (1) Administrative oversight;
 - (2) Quality standards;
 - (3) Policies and procedures, including house rules, for its residents to which the residents must agree to adhere. (C)
- Permits family members of a resident to reside in the residence to the extent permitted by protocols of the residence. (D)
- Prohibits a residence from limiting a resident's duration of stay to an arbitrary or fixed amount of time. Requires duration of stay to be determined by the resident's needs, progress, and willingness to abide by protocols. (E)
- Permits residents to receive MAT (F) and OMHAS-certified addiction services (G)

ORC 5119.01 Definitions

- **"Recovery housing residence"** means a residence for individuals recovering from alcohol use disorder or drug addiction that provides an alcohol-free and drug-free living environment, peer support, assistance with obtaining alcohol and drug addiction services, and other recovery assistance for alcohol use disorder and drug addiction. (A)(17)

ORC 5119.39 Certification or accreditation of recovery housing residences

- Requires OMHAS to monitor the operation of residences by either certifying residences OR accepting accreditation from NARR, Oxford house, or another organization OMHAS deems appropriate (A)
- If OMHAS certifies residences, requires it to establish requirements for initial certification and renewal, as well as grounds for disciplinary action against operators (B)

ORC 5119.391 Required form for recovery housing operator

- Requires OMHAS to monitor the establishment of recovery housing residences (A)
- Requires operators of recovery housing residences to file with OMHAS a form that includes:
 - (1) The name of the residence and any other name under which the residence does business;
 - (2) The address of the residence;
 - (3) The name of the person or government entity operating the residence;
 - (4) The primary telephone number and electronic mail address for the recovery housing operator;
 - (5) The date the residence was first occupied, or will be occupied, by its first resident;
 - (6) Information related to any existing accreditation or its equivalent that the residence has obtained or is in the process of obtaining;
 - (7) Any other information the department considers appropriate. (B)
- Recovery housing operators in existence before the law became effective (10/3/23) should already have filed the form; new operators must file no later than 30 days after first resident begins occupying the residence (C)

ORC 5119.392 Prohibition against operation without being certified or accredited

- Beginning 1/1/25, no one shall operate a recovery housing residence unless either:
 - (1) if OMHAS certifies recovery housing residences, the residence is certified OR if OMHAS accepts accreditation, the residence is accredited by NARR, Oxford house, or any other organization deemed appropriate by OMHAS; OR
 - (2) the residence has been operating for not more than 18 months and is actively engaged in efforts to obtain certification or accreditation, as applicable (A)
- If OMHAS determines that a residence is violating this section, it may ask the AG to petition the county court of common pleas for an injunction to stop operating (B)

ORC 5119.393 Complaint reporting and investigations

- Requires OMHAS to establish a procedure to receive and investigate complaints from residents, staff, and the public regarding recovery housing residences (A)
- Permits OMHAS to contract with NARR, Oxford house, or any other entity it deems appropriate to fulfill all or some of the functions associated with receiving and investigating complaints (A)

ORC 5119.394 Registry of recovery housing residences

- Requires OMHAS to establish and maintain a registry of recovery housing residences . For each residence, the registry shall include:
 - (1) Any information from the form required by ORC 5119.391(B) that OMHAS chooses to include in the registry;
 - (2) If a complaint received under ORC 5119.393 has been investigated and substantiated, a description of the complaint, the date the complaint was submitted to the department or its contractor, and the outcome of the investigation;
 - (3) Any other information the department considers appropriate. (A)
- Requires OMHAS to immediately remove from the registry a residence that ceases to be certified or accredited per ORC 5119.392 (B)
- Requires OMHAS to make the registry available to the public on its website (C)

ORC 5119.395 Prohibition against advertising without being certified or accredited

- Beginning 1/1/25, no one shall advertise or represent any residence to be a recovery housing residence unless it is on the registry established and maintained under ORC 5119.394 OR it is regulated by DRC (A)
- If OMHAS determines that a residence is violating this section, it may ask the AG to petition the county court of common pleas for an injunction to stop operating (B)

ORC 5119.396 Prohibition against referrals

- Beginning 1/1/25, prohibits community BH providers from referring clients to a recovery housing residence unless the residence is on the registry established and maintained under ORC 5119.394 on the date the referral is made.
- Requires community BH providers to maintain records of all referrals made to recovery housing residences.

OMHAS Recovery Housing FAQ

- Recovery residences are divided into four levels based on type and intensity/duration of support.
 - Levels 1-3 are not required to be certified or licensed by OMHAS. Level 4 offers the highest intensity of services and supports and must be licensed by OMHAS as a Residential Facility.
- Participation in services is required.
 - There may be expectations that residents attend meetings, complete household chores and/or abide by additional activities of daily living as a part of the recovery process.
 - These expectations should be clearly spelled out in policies and procedures and made clear to applicants prior to entrance to the recovery residence.
- Medications, including MAT, are allowed in recovery residences.
 - Some recovery residences do not accept applicants who are taking MAT.
 - Generally, a residence should state in its acceptance policy and medication policies the goals of maintaining a safe living environment and supporting recovery of everyone in the home including residents taking medication.
- "A relapse must be met with immediate action. Recovery residences must have a policy and procedure for relapse as well as an eviction policy that is consistent with Ohio Tenant-/Landlord laws."

ORH's Code of Ethics

- It is the obligation of all recovery residence operators and staff to value and respect each resident and to put each individual's recovery and needs at the forefront of all decision making. To meet this obligation, operators should follow these principles (and more!):
 1. Assess each potential resident's needs and determine whether the level of support available within the residence is appropriate. Provide assistance to the resident for referral in or outside of the residence.
 2. Value diversity and non-discrimination.
 3. Provide a safe, homelike environment that meets NARR Standards.
 4. Maintain an alcohol- and illicit-drug-free environment.
 5. Honor individuals' rights to choose their recovery paths within the parameters defined by the residence organization.
 6. Protect the privacy and personal rights of each resident.
 7. Provide consistent and uniformly applied rules.
 8. Provide for the health, safety and welfare of each resident.
 9. Address each resident fairly in all situations.

Grievance Procedures

- Recovery homes are not required to become certified or licensed by OMHAS, but they are required to have grievance policies that meet standards similar to the "Resident Rights and Grievance Procedure" (5122-30-22.1) and "Client Rights and Grievance Procedures" (5122:2-1-02) if they seek state or local funding.
- Residents should be able to submit a grievance to the operator in writing, so operators should have a clear process for resident grievances and should clearly communicate the process verbally and in writing to residents.
- The information must be accessible in a place where it is easily seen, and copies must be available to residents when requested.
- While grievances are not anonymous, they should be confidential.
- Written grievances should include the date, time, description of the incident and any names of people involved.
- Operators must respond in writing to the resident letting them know their grievance has been received, the operator's plan for reviewing or investigating the grievance, the timetable for completing the review, and the operator's contact information.

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.

Ohio's Fair Housing Laws

- All housing providers, including recovery housing operators, are covered under Ohio's fair housing laws.
- Ohio's fair housing laws make it illegal to discriminate in the sale, rental or financing of housing, or otherwise interfere with someone's housing rights based on his or her membership in the following protected classes:
 - Race
 - Color
 - Religion
 - Sex
 - Familial status (having at least one child who is younger than 18)
 - **Disability**
 - National origin
 - Military status

Ohio's Fair Housing Laws: Disability Protections

- Under Ohio's fair housing laws, a landlord may not treat a person with a **disability** in the following ways:
 - Refuse to allow reasonable modifications to a dwelling or common area, at their expense, if necessary for the disabled person to use the housing, OR
 - *Refuse to make reasonable accommodations in rules, policies, practices or services if necessary for the disabled person to use the housing, OR*
 - Design and construct covered dwellings that are inaccessible.

Landlord-Tenant Laws

ORC 5321.04 Landlord obligations

- Landlords must:
 - Supply running water
 - Comply with all housing, building, health and safety laws
 - Keep rental properties safe and sanitary
 - Make all necessary repairs within a reasonable amount of time.
 - Keep all electrical, plumbing, appliances, heating and ventilation systems and fixtures in good working order.
 - Except in the case of emergency or if it is impracticable to do so, give the tenant reasonable notice of the landlord's intent to enter and enter only at reasonable times.

ORC 5321.05 Tenant obligations

- Tenants must:
 - Pay rent when due
 - Keep the premises in clean, sanitary condition
 - Not damage or destroy any part of the property.
 - Use appliances, electrical, and plumbing fixtures properly.
 - Require that all other persons living in or visiting the property conduct themselves "in a manner that will not disturb his neighbors' peaceful enjoyment of the premises."
 - Not deny reasonable requests by the landlord to enter the premises.

ORC 5321.02 Retaliatory action by landlord prohibited

- A landlord may not retaliate against a tenant by increasing rent, decreasing services that are due to the tenant, or bringing or threatening to bring an action for possession of the premises because:
 - (1) The tenant complained to a governmental agency of a building violation that materially affects health and safety;
 - (2) The tenant complained to the landlord of any violation of ORC 5321.04;
 - (3) The tenant joined with other tenants for the purpose of negotiating or dealing collectively with the landlord on any of the terms and conditions of a rental agreement.
- If a landlord violates Ohio law, the tenant may:
 - (1) Use the retaliatory action of the landlord as a defense to an action by the landlord to recover possession of the premises;
 - (2) Recover possession of the premises;
 - (3) Terminate the rental agreement; or
 - (4) Recover from the landlord any actual damages together with reasonable attorneys' fees.

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.

How to Structure Compliant RH and SUD Services

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 Level I, Level II, or Level III recovery home in Ohio 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.
- 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.
- All recovery residences seeking to meet the OMHAS Quality Housing Criteria should ensure resident rights as consistent as possible with OAC 5122-30-22.1.

Questions?

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