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Using Disability Law to Strengthen New Protections**

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Substance Use Disorder, Discrimination, and The CARES Act: Using Disability Law to Strengthen New Protections

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Abstract

The COVID-19 pandemic is having devastating consequences for people with substance use disorders (SUD). SUD is a chronic health condition—like people with other chronic health conditions, people with SUD experience periods of remission and periods of exacerbation and relapse. Unlike people with most other chronic conditions, people with SUD who experience a relapse may face criminal charges and incarceration. They are chronically disadvantaged by pervasive social stigma, discrimination, and structural inequities. People with SUD are also at higher risk for both contracting the SARS-CoV-19 virus and experiencing poorer outcomes. Meanwhile, there are early indications that pandemic conditions have led to new and increased drug use, and overdose deaths are surging. More than ever, people with SUDs need access to evidence-based treatment and other services without structural barriers and with civil rights protections. To that end, a new provision in the Coronavirus Aid, Relief, and Economic Securities Act (CARES Act) strengthens penalties for the wrongful disclosure of SUD treatment records as well as addresses discrimination in multiple settings based on the misuse of those records.

People with SUD reasonably fear negative treatment and discrimination if their condition is exposed. To address this barrier, federal law strictly protects the confidentiality of SUD treatment records. These protections have existed for nearly 50 years; however, the stringent requirements have been blamed for hampered and even deadly treatment decisions by health care providers who do not have access to SUD treatment records.

Section 3221 of the CARES Act, effective March 2021, enacts the first major statutory changes to SUD treatment record confidentiality since 1992 and is aimed at improving information sharing among SUD treatment providers and other health care providers. But increased information sharing also creates concerns about information misuse and discrimination, and the possibility of renewed treatment avoidance. To address the tension between the benefits of information sharing and the possible harms of discrimination after disclosure, Section 3221 strengthens the disclosure penalties to align with HIPAA. It also adds an entirely new nondiscrimination provision which prohibits discriminatory use by recipients of disclosed SUD treatment information in areas including health care, employment and receipt of worker's compensation, rental or sale of housing, access to courts, and social services and benefits funded by federal, state, or local governments.

This essay provides the first analysis of the new nondiscrimination protections in Section 3221 of CARES Act for individuals with SUD using the framework of existing protections against disability-based discrimination in the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, Section 1557 of the Patient Protection and Affordable Care Act, and the Fair Housing Act. We propose that as the new protections of Section 3221 are implemented through regulations, guidance, and enforcement, they should be understood within the context of existing disability nondiscrimination laws as well as the specific purpose of Section 3221 to ensure that discrimination against such people does not continue to serve as a barrier to seeking treatment. We offer three insights to achieve this goal. First, the new protections should be understood to include current illegal substance users and should be construed broadly. Second, the scope of entities covered by the new protections should be interpreted consistently with existing definitions in laws that prohibit disability-based discrimination in employment, public programs, services, and activities, health care, and housing. Finally, robust enforcement must be coupled with educational initiatives about the pervasive discrimination faced by people with SUDs, and new and existing nondiscrimination requirements that protect them.

Keywords: COVID-19, Pandemic, Substance use disorder, SUD, The Coronavirus Aid, Relief, and Economic Securities Act, CARES Act, Section 3221, HIPAA, medical privacy, SUD treatment records, discrimination, stigma, disability, disability discrimination, Americans with Disabilities Act, ACA, Rehabilitation Act

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