

# Considerations when a BON disciplinary process is based on substance use disorder

New programs and laws help nurses get treatment and protect their licenses.

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*Editor's note: Access part 1 at [americannursetoday.com/?p=55520](http://americannursetoday.com/?p=55520).*

**NURSES** who face board of nursing (BON) action related to substance use disorder should know that state and federal laws and programs exist to support them when seeking treatment and returning to work. (See *Employee protection laws*.) For example, the Family and Medical Leave Act lets people take unpaid leave for treatment and return to work when treatment is complete.

Three major changes have helped nurses with substance use disorders in proceedings before BONs:

first-offender drug programs, amended nurse practice acts (NPAAs), and the availability of professional liability insurance that provides coverage for professional disciplinary proceedings.

## First-offender programs

Many states have passed first-offender drug programs (FODPs) as part of their criminal laws. FODPs are available to anyone charged with a felony that allows probation; examples include possession of a controlled substance or prescription fraud. The programs provide advantages that wouldn't otherwise be

available to nurses charged with such crimes. They assist nurses with substance use disorder treatment and avoid a misdemeanor or felony conviction, which can result in jail or prison time. The programs aren't specifically designed to affect professional licensure but avoiding conviction can help a licensee retain his or her license and job.

FODP eligibility varies by state. Some limit the application of the program to misdemeanor charges. Others apply the program to specified felony charges as well. Nurses who have a previous felony conviction, have been placed on proba-





tion in the past, have already participated in an FODP, or have been granted a “conditional discharge” (the discharge isn’t complete until court-specified requirements, such as paying restitution, are met) for any felony offense, are ineligible.

Nurses or their attorneys must request entry into an FODP. The judge then reviews the conditions of the case and makes a final decision. While nurses are in the FODP, all judicial proceedings are stayed until successful completion of the program. Mandatory program treatment typically includes drug testing, counseling and rehabilitation, medical treatment, and if the substance use disorder is evaluated to be caused by a mental health disorder, psychiatric treatment.

When nurses successfully complete the program, they’re discharged, and criminal charges are dismissed. As a result, if a BON decides to discipline a nurse, the professional discipline won’t be due to a criminal conviction but rather violation of another basis in the act, such as unprofessional conduct. In some states, however, successful completion of a treatment program is considered a conviction for purposes of licensure.

### Amended NPAs

Some states’ NPAs now require that whenever a complaint is lodged alleging substance misuse by a nurse, he or she must be evaluated by a certified addictionologist (for example, psychiatrist or advanced practice RN) before the case is heard by the BON. In these states, the nurse’s attorney contacts the BON and informs it that the evaluation has been scheduled and with whom. The nurse must give consent to have the final evaluation released to the board.

These evaluations vary by state. In Illinois, for example, the comprehensive evaluation includes the nurse’s social history, family and nurse substance misuse history, the

## Employee protection laws

The following laws are relevant to all employees (including nurses) with a substance use disorder:

- National Labor Relations Act of 1935
- Civil Rights Act of 1964
- Affordable Care Act of 1990
- Americans With Disabilities Act of 1990
- Family and Medical Leave Act of 1993
- Mental Health Parity and Addiction Equity Act of 2008
- Employee assistance programs
- State unemployment laws
- State workers’ compensation laws

Title 1 of the Americans with Disabilities Act prohibits employee discrimination on the basis of a disability if the employee is qualified to perform the “essential” job functions with or without reasonable accommodation. So, if a nurse who has a substance use disorder can’t be fired solely on the basis of that disability. And after successful treatment, the nurse can’t be denied a return to his or her position. A reasonable accommodation for the nurse might include working only a particular shift so he or she can attend aftercare group meetings.

The Mental Health Parity and Addiction Equity Act of 2008 requires that employees with a substance use disorder receive equal treatment in health insurance plan benefits, including outpatient programs, residential treatment, and emergency care.

nurse’s psychiatric health, and past or present medical illnesses. Most important is the requirement that the evaluator clearly state whether a substance use disorder exists. In the case of a diagnosed disorder, the addictionologist recommends treatment options and whether the nurse can safely practice. If a disorder isn’t diagnosed and the BON determines that no additional substance misuse concerns exist, the complaint may be dismissed.

Addictionologist evaluations also can be used after a nurse completes treatment and returns to work, as was the case with Melissa\* described in part one of this article. Her BON required an evaluation within 1 year of full license reinstatement. The addictionologist assessed Melissa’s con-

tinued sobriety, fitness for duty, any conditions or restrictions on practice, and her success in the monitoring program. This oversight helped ensure Melissa’s ability to continue practicing and fulfilled the BON’s duty to protect the public.

### Professional liability insurance protection

Not long ago, most nurses didn’t purchase their own professional liability insurance. Instead, they relied on their employer to provide it. These policies covered representation by an attorney provided by the carrier or an attorney hired by the employer if self-insured. It didn’t cover professional liability defense in BON proceedings. Even when nurses began purchasing their own

## Substandard practices

The following unacceptable nursing practices can lead to allegations of substance use disorder:

- mishandling documentation of controlled substances (for example, failing to document medication administration or not having two nurses count controlled substances at the end of shift)
- incorrectly counting controlled substances
- pouring controlled substances before a patient needs them to save time
- borrowing one patient's medications or controlled substance for another patient
- failing to sign off on automated medication systems.

policies, defense proceedings usually weren't covered.

Today, more commercial professional liability policies cover disciplinary proceedings. This is an important development since these proceedings, even when a hearing isn't the end result, are expensive.

For the premium charged, the nurse is the "named" insured, which translates to control over what happens during the proceedings. For example, a settlement in a case can't take place without the nurse's consent. The premium also includes legal representation and may cover other costs, such as days off from work during the proceedings. The exact amount of coverage and the costs covered by the premium are listed in the policy.

### Communication

Honesty and open lines of communication are critical to successful reinstatement to full practice. Any nurse with a substance use disorder should speak openly with the BON and treatment and monitoring personnel to facilitate the transition from a nurse with a substance use disorder to a nurse who can, with continued aftercare, practice nursing competently and safely.

Open communication also is essential between the nurse and his or her legal counsel. Without that, the attorney can't provide appropriate advice or adequately represent the nurse before the board.

### Unacceptable nursing practice

Some nurses may not have a substance use disorder but still be at risk for an allegation by their em-

ployer because of their professional practice. Short staffing, heavy patient loads, acutely ill patients, and working long shifts can result in nurses taking shortcuts in their practice that mimic diversion. I've represented several clients before BONs who weren't misusing substances but came under suspicion because of their substandard administration and documentation of medications. (See *Substandard practices*.)

Fortunately, after an objective evaluation by an addictionologist and truthful reporting to the BON of the working conditions at my clients' places of employment, no discipline was imposed on them. However, the board cautioned the nurses that their practice wasn't consistent with standards of nursing practice, and if it received a second complaint, the nurses would be disciplined.

### A compassionate approach

Substance use disorder is a serious health problem that's stigmatizing and isolating and frequently raises legal difficulties. The public, state and federal laws, and BONs have come a long way in understanding this condition, but more needs to be done.

One simple solution to bolster understanding is to treat those with a substance use disorder with the same sensitivity one would offer anyone with a chronic condition. A compassionate approach includes support, quality treatment, and life-long aftercare to help the nurse overcome obstacles to recovery, including denial, fear, an inability to seek help, and isolation.

Nurse clinicians, nurse educators, and members of professional nursing associations need to lobby their state legislatures to mandate addictionologist evaluation in state NPAs. Requiring these evaluations will result in objective, qualified recommendations that BONs can act upon when determining a nurse's need for treatment and when he or she can safely return to practice. ★

\*Name is fictitious.

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