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Tightening the Screws on Mental Health Parity Enforcement

The Consolidated Appropriations Act, 2021 (the "CAA") was signed into law on December 27, 2020 and imposed a substantial new requirement that a group health plan perform and document its compliance with the Mental Health Parity and Addiction Equity Act ("MHPAEA"). Specifically, group health plans must prepare a comparative analysis of the plan's mental health, substance use disorder ("MH/SUD"), and medical/surgery ("M/S") nonquantitative treatment limitations ("NQTLs") to demonstrate the plan does not impose more stringent limitations on MH/SUD benefits as compared to M/S benefits. Our prior publication includes a more detailed description of the requirement.

Beginning February 10, 2021, group health plans were required to produce the comparative analysis to regulators and participants upon request.

Federal Regulators Increase Their Scrutiny of MHPAEA Compliance

In the 2022 MHPAEA annual report to Congress, regulators noted that plans failed to provide NQTL comparative analyses that contained sufficient information to demonstrate compliance with the MHPAEA, further indicating that none of the comparative analyses they reviewed were sufficient as initially submitted. As a result, regulators have committed significant resources to enhance MHPAEA enforcement.

The 2023 annual report to Congress noted that of the Employee Benefits Security Administration's ("EBSA") 182 requests for comparative analyses covering over 450 NQTLs, EBSA issued 138 insufficiency letters, 53 initial determination letters finding MHPAEA violations, and three final determinations finding MHPAEA violations, thereby requiring the plans to send the statutorily required violation notice to their participants and beneficiaries.

Many of the insufficiencies resulted from a lack of supporting documentation showing how the plans are applying NQTLs in practice or operation, not just as written. Comparative analyses missing this documentation fall short of the statutory requirement and subject the plan to enforcement action. A failure to provide the analysis upon request or providing an analysis that reveals noncompliance with the MHPAEA may result in $100 per day penalties per affected individual, possible general ERISA penalties, or civil litigation (both public and private).

The 2023 report identified six main problem areas that are the focus of federal regulators:

- prior authorization requirements for in network and out of network inpatient services;
- concurrent care review for in network and out of network inpatient and outpatient services;
- standards for provider admission to participate in a network, including reimbursement rates;
- out of network reimbursement rates and how they were determined;
- impermissible exclusions of key treatments for mental health conditions; and
- adequacy standards for mental health provider networks.

Some key treatment exclusions singled out were nutritional counseling, applied behavior analysis ("ABA") therapy for treatment of autism spectrum disorder, and medication assisted treatment and medications for opioid use disorder. While it is clear that regulators will not close investigations until they are satisfied no MHPAEA violations exist, they are also currently allowing significant opportunity for plans to cure deficiencies before issuing final determinations.

In a recent blog post, EBSA Assistant Secretary Lisa Gomez highlights plan shortcomings and encourages the public to reach out to EBSA via its website and a hotline created for reporting MHPAEA violations, which further indicates EBSA's commitment to bring plans into compliance.

Proposed Rules Foreshadow Sweeping Changes to MHPAEA Enforcement

On July 25, 2023 federal regulators proposed new rules that, if adopted as is, would place significantly more requirements on group health plans under the MHPAEA. Among other things, these proposed rules would establish new minimum standards for developing NQTL comparative analyses and set forth the required content elements of the NQTL comparative analyses, including applying the "substantially all/predominant" test, which currently applies to quantitative treatment limitations ("QTLs"), to NQTLs. This requirement would likely eliminate the imposition of many NQTLs altogether, particularly those that impose prior authorization or concurrent review, as these limitations are not typically applied to "substantially all" of M/S benefits.

Other notable rule changes include:

- Sunsetting the option for self funded, nonfederal governmental plans to opt out of compliance with the MHPAEA;
- Providing that the identification of material differences in access to MH/SUD benefits (as compared to M/S benefits) would be considered a strong indicator that the plan violates certain MHPAEA requirements, and plans would be required to take action to address material differences in access or no longer impose the relevant NQTLs;
- Requiring "meaningful benefits" in each classification of MH/SUD benefits as compared to benefits provided for M/S conditions in that classification. For example, excluding nutritional counseling and ABA treatment would fail this "meaningful benefits" test; and
- Requiring ERISA plan fiduciaries to certify the comparative analysis.

These proposed rules, if finalized, would apply on the first day of the first plan year beginning on or after **January 1, 2025**.

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Action Items for MHPAEA Compliance

Employers should be prepared to comply with new MHPAEA rules once final regulations are issued. Plans must continue to prepare comparative analyses, keep them up to date, and be ready to provide them to regulators or participants upon request. The proposed rules reinforce prior guidance, identifying many specific elements and data points that will be required in each comparative analysis. At a minimum, each comparative analysis must include the following six elements:

- a description of the NQTL;
- the identification and definition of the factors used to design or apply the NQTL;
- a description of how factors are used in the design or application of the NQTL, including how the factors relate to and are applied in relation to each other;
- a demonstration of comparability and stringency, as written;
- a demonstration of comparability and stringency in operation; and
- findings and conclusions, including any action plans to address any identified concerns or noncompliance.

If the comparative analyses raise concerns over MHPAEA compliance, employers should take steps to address those issues. For example, if the comparative analyses show problems with access or network composition, plans should take steps to ensure a broad range of mental health and substance use disorder providers are available. Plans should be prepared to document the actions they have taken and to demonstrate why any disparities are attributable to provider shortages in the geographic area rather than their NQTLs related to network composition. If you have questions or need assistance with the NQTL, please call a member of our Employee Benefits and Executive Compensation Group.