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Mental Health Parity - New Requirements for Plan Sponsors

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On August 12, 2021, the U.S. Department of Labor announced a $15.6 million settlement related to violations of the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). In the news release announcing the settlement, the Department reiterated its position that compliance with MHPAEA is one of its highest enforcement priorities. In addition, the Employee Benefits Security Administration (EBSA) commenced an audit program for compliance with MHPAEA, including making requests for the "comparative analysis" required by the Consolidated Appropriations Act, 2021(Appropriations Act). The urgency of addressing MHPAEA compliance is not in doubt, but employers are finding the roadmap for getting there difficult.

Mental Health Parity - The Law

MHPAEA requires group health plans and insurers to ensure that the financial requirements (such as coinsurance and copays) and treatment limits on mental health or substance use disorder benefits (MH/SUD benefits) are no more restrictive than the predominant financial requirements and treatment limits that apply to substantially all medical and surgical benefits (Med/Surg benefits) in a classification. The six classifications are: (1) inpatient, in-network; (2) inpatient, out-of-network; (3) outpatient, in-network; (4) outpatient, out-of-network; (5) emergency care; and (6) prescription drugs. Treatment limits include quantitative limits and non-quantitative limits. A quantitative treatment limit is one that can be expressed numerically, such as a limit on the number of visits that will be covered. A non-quantitative treatment limit (NQTL) is a limit which applies in some way to limit the scope or duration of benefits that are provided under the plan. Examples of NQTLs include medical necessity, experimental or investigative treatment standards, prescription drug formularies, network tier designations, methods for determining usual, customary and reasonable amounts, network adequacy, and step therapy requirements.

The Appropriations Act amended MHPAEA to add several provisions designed to facilitate and strengthen compliance with that law. One of the key changes made is to add a requirement, effective February 10, 2021, that group health plans (which includes self-insured health plan sponsors) and insurers perform and document comparative analyses of the design and application of NQTLs for the MH/SUD benefits provided by the plan. This analysis must be made available to EBSA and plan participants upon request. On April 2, 2021, the Departments of Treasury, Labor and Health and Human Services (collectively, the Departments) jointly released a set of FAQs (Part 45) which provide additional information regarding the comparative analysis requirement.

New MHPAEA Comparative Analysis

Under MHPAEA, any processes, strategies, evidentiary standards, or other factors used in applying an NQTL to MH/SUD benefits (both as described in the plan document and in operation) must be comparable to, and applied no more stringently than, those that apply to Med/Surg benefits in the same classification. The MHPAEA final regulations are clear that plans and insurers may consider a wide array of factors when determining whether to impose a particular NQTL.

While MHPAEA's NQTL rules have been in place for many years, plans and insurers that impose NQTLs with respect to their MH/SUD benefits must be prepared to make available a "comparative analysis" demonstrating that the processes, strategies, evidentiary standards, and other factors used to apply NQTLs to MH/SUD benefits are comparable to, and are applied no more stringently than with respect to Med/Surg benefits in each of the six classifications. The FAQs expand on the information that must be included as part of the Comparative Analysis. In general, the Comparative Analysis must contain a specific, detailed, and reasoned written explanation of the specific plan terms and practices at issue, and include the bases for the conclusion that the NQTLs comply with MHPAEA. The FAQs direct plans and insurers to the Department of Labor's MHPAEA self-compliance tool which outlines a process that can be used to conduct the Comparative Analysis. According to the Departments, information identified by the self-compliance tool (which has been available for many years) "closely aligns" with the information that is required to support the Comparative Analysis.

In the FAQs, the Departments state that they intend to focus their enforcement efforts on the following NQTLs: (1) prior authorization requirements for in-network and out-of-network inpatient services, (2) concurrent review for inpatient and outpatient services, (3) standards for provider admission to participate in a network, including reimbursement rates, and (4) out-of-network reimbursement rates (plan methods for determining usual, customary and reasonable charges). However, they may request the comparative analysis for any NQTL imposed by the plan. Plans and insurers are directed to be prepared to make available a list of all NQTLs for which they have prepared a Comparative Analysis and a general description of any documentation that exists regarding each analysis.

In an upcoming blog post, we will discuss the Comparative Analysis in detail, including next steps for plan sponsors, as well as the related participant disclosure requirements.