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Mental Health Parity Compliance Becomes New Once Again

Since the passage of the original mental health parity requirements over two decades ago, mental health parity can be described as riding a porpoise as it dives in and out of the waters of compliance. However, with the passage of the Consolidated Appropriations Act, 2021 and new guidance from the Employee Benefits Security Administration, mental health parity can now be described as riding an endless wave of legal compliance.

New Mental Health Parity Comparative Analysis

Section 203 of the Consolidated Appropriations Act, 2021, Division BB ("CAA") established new legal compliance standards for nonquantitative treatment limitations ("NQTL"). In general, NQTLs are limitations on mental health and substance abuse benefits that are not numerical in nature. NQTLs include the following plan design limitations –

- Medical necessity and experimental or investigative treatment standards,
- Prescription drug formularies,
- Network tier designations,
- Methods for determining usual, customary and reasonable amounts, and
- Step therapy requirements.

Beginning February 10, 2021, the CAA requires that a group health plan (e.g., sponsor of a self-insured plan) perform and document comparative analyses of the design and application of NQTLs and make available to EBSA, upon request, the comparative analyses. The comparative analyses must include the following information –

- The specific plan or terms regarding NQTLs and a description of all mental health or substance use disorder and medical or surgical benefits to which each such term applies,
- The factors used to determine that the NQTLs will apply to mental health or substance use disorder benefits and medical or surgical benefits,
- The evidentiary standards used for the factors identified above, and
- A comparative analyses demonstrating that the processes, standards, evidentiary standards, and other factors used to apply the NQTLs to mental health or substance use disorder benefits, as written and in operation, are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, and other factors used to apply the NQTLs to medical or surgical benefits in each benefits classification.

EXAMPLE: Every group health plan requires that an item or service be medically necessary for the item or service to be covered by the plan. The CAA requires the plan to perform an analysis comparing how the medically necessary requirement applies to medical benefits and mental health benefits, and indicating that the medically necessary requirement is applied no more stringently to mental health benefits than it is to medical benefits.

In April 2021, EBSA issued new frequently asked questions regarding mental health parity and the new CAA requirements. EBSA indicated that the comparative analyses must be "detailed, reasoned and robust." The FAQs also expand upon the requirements in the CAA, and list in excessive detail nine elements that every comparative analyses must include to be sufficient.

Participant Disclosure Requirements

Based on previous guidance, plan sponsors should keep in mind that participants do have the authority to request additional mental health parity information. Based on previous guidance, participants are entitled to comparative information on medical necessity criteria for mental health benefits, as well as the standards and other factors used to apply NQTLs to mental health benefits. In addition, ESBA provided in the frequently asked questions that plans subject to ERISA must provide the comparative analyses required by the CAA to participants, upon request.

Next Steps

The comparative analyses requirement is currently in effect. Under ERISA Section 104, upon request, plan sponsors have 30 days to provide the comparative analyses to participants. It is safe to presume that EBSA would also allow 30 days to provide the comparative analyses to EBSA. If EBSA determines that the comparative analyses is insufficient, the CAA provides for a 45-day corrective action period that allows the plan to cure any deficiencies.

Self-insured plan sponsors will need to rely on their third party administrators for many of the comparative analyses requirements. However, because this is a new requirement, providing such analyses likely is not covered by existing service agreements. Further, because self-insured plan sponsors are liable for not providing a detailed comparative analyses, sponsors will need to ascertain the legal sufficiency of the analyses performed by a TPA and likely supplement the analyses with additional information and documentation.