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Mental Health Parity Part II – Next Steps for Plan Sponsors

by Martha L. Sewell

Last week we discussed on our ERISA Blog that the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) has become a top agenda item for plan sponsors in 2021. In this next post we will discuss the next steps that plan sponsors must take to comply with the new MHPAEA requirements. The Consolidated Appropriations Act of 2021 amended MHPAEA to add several provisions designed to facilitate and strengthen compliance. 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

As revised by the Appropriations Act, plans and insurers that impose NQTLs must be prepared to make available a "comparative analysis" demonstrating that the processes, strategies, evidentiary standards, and other factors used to apply NQTLs to mental health benefits are comparable to, and are applied no more stringently than with respect to medical benefits. A NQTL is a non-quantitative treatment 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 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. At a minimum, it must include a robust discussion of the following:

- A description of the NQTL, plan terms and policies at issue, and the specific mental health/substance use disorder ("MH/SUD") benefits and medical/surgical ("Med/Surg") benefits to which the NQTL applies within each of the six classifications. (See our prior ERISA blog post for a discussion of the six classifications.)

- Identification of any factors, evidentiary standards or sources, or strategies or processes considered in the design or application of the NQTL and in determining which benefits are subject to the NQTL.

- Explanation of whether any factors were given more weight than others and the reason(s) for doing so, including an evaluation of any specific data used in the determination.
- If any of the factors, evidentiary standards, strategies, or processes are defined in a quantitative manner, the precise definitions used and any supporting sources.
- Explanation of whether there is any variation in the application of a guideline or standard used by the plan between MH/SUD benefits and Med/Surg benefits and, if so, a description of the process and factors used to establish that variation.
- If the application of the NQTL turns on specific decisions in administration of the benefits, identification of the nature of the decisions, the decision maker(s), the timing of the decisions, and the qualifications of the decision maker(s).
- An assessment of the qualifications of each expert relied upon in preparing the Comparative Analysis and the extent to which the plan ultimately relied upon each expert's evaluations in setting recommendations regarding both MH/SUD benefits and Med/Surg benefits.
- A reasoned discussion of the plan's findings and conclusions as to the comparability of the processes, strategies, evidentiary standards, factors, and sources identified above within each affected classification, and their relative stringency, both as applied and as written. This discussion should include citations to any specific evidence considered and any results of analyses indicating that the plan or coverage is or is not in compliance with MHPAEA.
- Include the date of the analyses and the name, title, and position of each person who assisted with the comparative analyses.

In addition, if the Comparative Analysis refers to a specific document or information, the plan should be prepared to provide that document or information on request. For example, the following information should be available:

- Records documenting NQTL processes and detailing how the NQTLs are being applied.
- Any documentation (including any guidelines, claims processing policies and procedures, or other standards) that has been relied upon to determine that the NQTLs apply no more stringently to MH/SUD benefits than to Med/Surg benefits.
- Samples of covered and denied MH/SUD Benefit and Med/Surg Benefit claims.
- Documents related to MHPAEA compliance with respect to service providers to which it delegates management of such benefits.

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.

Participant Disclosure Requirements

The MHPAEA regulations and earlier guidance from the Departments are clear that Federal law, including Section 104(b)(4) of ERISA, requires that participants be given, upon request, comparative information on medical necessity criteria for MH/SUD benefits and Med/Surg benefits, as well as the standards and other factors used to apply NQTLs. (Section 104(b)(4) requires the plan administrator to respond within 30 days.) In earlier guidance, the Departments provided a model form that participants can use to request information relating to the plan's MH/SUD benefits. ERISA-covered plans are also required to provide the Comparative Analyses to participants, upon request. In a recent case involving an NQTL applied to MH/SUD benefits, the court assessed significant penalties under Section 104(b)(4) of ERISA for the plan's failure to provide the medical necessity criteria for certain medical/surgical benefits despite repeated requests. Employers must be prepared for these requests and respond diligently.

Next Steps

Employers must put compliance with the MHPAEA comparative analysis requirement at the top of the list of issues to be addressed. Employers with self-insured health plans bear the risk of liability relating to noncompliance with MHPAEA. Yet, they do not have the expertise or the information that is needed to perform and document the required analysis. As a result, they will have to rely on the plan's third party administrators to provide much of what is needed to comply. However, because the Comparative Analysis is a new requirement, it is likely not addressed by existing service agreements.

For employers with self-insured plans, one of the first steps is to reach out to the plan's third party administrator(s) to ask what assistance each administrator will provide with regard to the Comparative Analysis. Some third party administrators are indicating that they will provide the Comparative Analyses, but only if the employer adopts the administrator's standard plan design or processes. Others are taking the position that they will provide certain information relating to the MH/SUD benefits, but the employer will be responsible for MHPAEA compliance, including performing the Comparative Analyses. In either case, employers will have to work with legal counsel to ensure that the plan's Comparative Analyses are compliant, but clearly there is much more work to do in the latter situation. Employers should also review their administrative services agreements for provisions that may be needed regarding MHPAEA compliance, including timing and responsibility for required participant disclosures.