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The Agencies Address MHPAEA Enforcement Priorities in Report to Congress

On January 25, 2022, the U.S. Departments of Labor (DOL), Health and Human Services (HHS), and Treasury (IRS), published the 2022 MHPAEA Report to Congress (the "Report"). We will refer to the DOL, HHS, and IRS collectively as the "Agencies" in this Alert. The Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) requires the Agencies to submit an annual report to Congress highlighting MHPAEA enforcement efforts and priorities, dedicated resources to support these efforts, findings, and noncompliance trends.

The Report focused on enforcement activity for the recent self-assessment for non-quantitative treatment limitations (NQTLs) required by the Consolidated and Appropriations Act, 2021 (CAA). The Agencies gave failing marks and a stern rebuke to self-insured medical plan sponsors, insurance carriers, and the third party vendors assisting group health plans with MHPAEA compliance.

This Alert summarizes the Agencies' findings, identifies red flags for employers sponsoring group health plans subject to the MHPAEA, and provides tips on possible next steps to prevent unnecessary risk in the event of agency enforcement action and participant claims.

Mental health parity rules

In a prior Alert, we discussed that MHPAEA requires that a group health plan[1] cannot impose quantitative treatment limitations (QTLs) or NQTLs on mental health or substance use disorder (MH/SUD) benefits that are more restrictive than the limitations imposed on similar medical/surgical benefits.

QTLs are numerical and include a plan's cost sharing and visit limits for services. We believe QTL compliance is high, because QTLs are generally visible in the plan design and their compliance requirements are objective.

NQTLs include processes, strategies, evidentiary standards and other factors used in determining whether a benefit should be covered or denied. Examples of the most common NQTLs include preauthorization, fail-first protocols, and medically necessary standards. NQTL compliance tends to be lower, because many NQTLs are not visible in the plan design and their compliance requirements are more subjective. As a result, the DOL began placing an emphasis on NQTL compliance several years ago.

The CAA advanced NQTL compliance by amending MHPAEA to impose a new administrative requirement on plans subject to the federal mental health parity rules. As of February 10, 2021, group health plans that impose NQTLs on MH/SUD benefits must:

(1) Complete a self-assessment to identify and analyze all NQTLs placed on MH/SUD benefits; and

(2) Document compliance with MHPAEA by outlining how the NQTLs placed on MH/SUD benefits are no more restrictive than their medical/surgical counterparts.

[1] In most instances, the rules only apply to medical/Rx plans.

This compliance obligation belongs to insurance carriers for fully insured plans and plans sponsors for self-insured plans. The plan sponsor is the employer for most employer-sponsored coverage and the board of trustees or other governing body for multiple employer plans. The CAA also includes minimum enforcement activity requirements, requiring the Agencies to look into NQTLs and the self-assessment requirement further.

Note: The NQTL self-assessment has been a recommended best practice for plans to ensure compliance with MHPAEA's NQTL rules. The CAA merely turns the self-assessment from a best practice into a requirement that plans must make available to the Agencies (including additional state agencies) upon request.

Report insights

The Report summarizes both DOL and HHS enforcement activity. The Employee Benefits Security Administration (EBSA), a division of the DOL, has primary enforcement authority for MHPAEA for insurance carriers and group health plans sponsored by private employers. The Centers for Medicare & Medicaid Services (CMS), a division of HHS, has primary authority over MHPAEA enforcement for insurance carriers in Texas, Missouri and Wyoming, as well as group health plans sponsored by non-federal governmental employers.

Enforcement activity

Both the DOL and the Biden Administration commented last year that MH/SUD parity is a top enforcement priority. The new Report echoes this theme, detailing the Agencies' expanded staffing, internal training, and increased staff specialization devoted to MHPAEA compliance. Specialization examples include the creation of a national MHPAEA enforcement project and formation of a MHPAEA NQTL task force. The task force focused investigations and further review of the following NQTLs in 2021: 1) preauthorization for inpatient services; 2) concurrent care review for inpatient and outpatient services; 3) out-of-network provider reimbursement rates; and 4) provider network admission and participation criteria.

The NQTL self-assessment reviews increased MHPAEA enforcement in 2021. The DOL performed many of these reviews through existing open investigations and initiated others based on specific investigatory leads. The following is an overview of this enforcement activity:

- EBSA issued 156 letters, requested NQTL self-assessments covering 86 separate investigations and reviewed 216 total NQTLs (CMS issued 15 letters requesting 21 NQTL self-assessments);
- The Agencies collectively issued 99 insufficiency letters identifying deficiencies in response to self-assessment requests;
- The Agencies collectively issued 45 initial determination and found 64 NQTLs imposed on MH/SUD benefits out of parity with medical/surgical benefits; and
- The Agencies received corrective action plans from 25 plans and carriers in response to initial findings of noncompliance for correction of 43 unique NQTLs.

The Agencies primarily focused on large employer self-insured medical/Rx plans and their third party administrators (TPAs). The Report only summarizes enforcement activity through October 31, 2021. As of that date, the Agencies had not issued any final determinations of noncompliance.

The Agencies are still engaged in fact-finding and analysis for most plans, but initially found all 2021 audited plans to be out of compliance (so far). We do not know what the ramifications will be for this yet, including any penalties the Agencies may assess or what other remedies they will seek. The Agencies are seeking prospective plan changes for plans submitting corrective action plans in response to the Agencies' initial noncompliance findings.

Initial findings: Unprepared plans and insufficient responses

The Agencies noted that all of the self-assessments initially provided were insufficient. In other words, the Agencies did not find a single entity in compliance with the NQTL self-assessment requirement. While the Agencies later concluded some plans met the NQTL requirements after reviewing additional documentation, the Agencies universally gave employers and insurance carriers failing marks.

The Agencies expressed significant disappointment with how unprepared the entities were despite prior guidance on how to meet the new self-assessment requirement. In the entities' defense, the available guidance on how to complete a self-assessment is lacking.

The Report outlines the common deficiencies seen across the board by the Agencies, and notes that the DOL specifically warned plans and insurance carriers about these insufficiencies in prior guidance.[2]

- Failure to perform the self-assessment before designing and applying the NQTL;
- Conclusory parity statements without supporting evidence or specific explanation;
- Lack of meaningful comparison or analysis between NQTLs for MH/SUD and medical/surgical benefits;
- Nonresponsive self-assessments that didn't address specific NQTLs;
- Documents provided without explanation of how they relate to or support the analysis;
- Failure to identify the specific MH/SUD and medical/surgical benefits affected by a NQTL;
- Assessments that only analyzed a portion of the NQTL at issue;
- Failure to identify or provide sufficient detail about all factors considered in applying the NQTL;
- Failure to demonstrate the application of identified factors in the design of the NQTL; and
- Failure to demonstrate the NQTL is applied to MH/SUD benefits in parity with medical/surgical benefits.

Each of the 99 insufficiency letters gave the plan or insurance carrier another bite at the apple to provide another response before the Agencies determined the plan is out of compliance. When preparing these responses, the Agencies have made it clear that it is the plan or insurance carrier's burden to explain how the plan's NQTLs comply with MHPAEA by providing detailed analysis and supporting documentation. The Agencies will not expend effort to connect the dots and do the entity's job for them.

Comparative analysis review: Prohibited NQTLs

The noncompliant NQTLs identified by the Agencies fell into 14 different categories.[3] The Report provided significant detail on five specific types of noncompliant NQTLs as well as the prospective corrections plans and insurance carriers are currently undertaking.

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[2] FAQs about the Mental Health and Substance Use Disorder Parity Implementation and the Consolidated Appropriations Act, 2021 Part 45 at Q/A 3

[3] See page 13 of the 2022 MHPAEA Report to Congress for the list of 14 most common NQTLs uncovered in self-assessment reviews, listed in order of descending frequency. Preauthorization and pre-certification requirements topped that list, shortly followed by ABA therapy treatment limitations in the #4 spot.

1. **Applied Behavioral Analysis (ABA) Therapy Limitations and Exclusions:** The Agencies indicated that a total exclusion for ABA therapy when a plan covers autism spectrum disorder (ASD) is a NQTL violation on the basis that ABA therapy is a primary treatment for ASD if there are no similar exclusions for primary treatments of medical/surgical conditions.

2. **Exclusions on Medication-Assisted Treatment for Opioid Use Disorder:** The Agencies indicated that exclusions for methadone and naltrexone as treatment for covered SUD conditions is a NQTL violation on the basis that these medications are essential to opioid use disorder treatment if there are no similar restrictions placed on medications to treat medical/surgical conditions.

3. **Nutritional Counseling Exclusions for Eating Disorders:** The Agencies indicated that excluding coverage for nutritional counseling for MH/SUD conditions (including eating disorders) was a NQTL violation when the plan covers nutritional counseling for medical/surgical conditions such as diabetes.

4. **Limitation on Drug Testing for Substance Use Disorders:** The Agencies indicated urine drug testing is an integral part of SUD treatment and often required to continue residential treatment. An automatic denial of urine drug testing related to SUD diagnosis is a NQTL violation if the plan does not impose similar limitations for integral treatments for medical/surgical benefits.

5. **Blanket Pre-Certification Requirement for MH/SUD Benefits:** The Agencies re-confirmed that requiring pre-certification for all MH/SUD outpatient services while only requiring pre-certification for select medical/surgical outpatient services is a NQTL violation.

After receiving their initial noncompliance determinations, a number of the plan sponsors and insurance carriers submitted corrective action plans to the Agencies. While the Agencies review these proposed corrective action plans and determine whether additional action is necessary, their focus is on prospective corrective action. This includes plan amendments to remove noncompliant NQTLs, provide coverage for previously excluded MH/SUD benefits, and notifying participants of plan changes.

Additional Remedies? The Report also mentions continued Agency involvement with service providers and insurance carriers to identify wrongfully denied claims and affected individuals. We think the Agencies may also require plans to reprocess or cover prior denied claims. To our knowledge, the Agencies have not assessed the $100/day excise tax for non-compliance related to any of the 2021 self-assessment reviews. The Agencies signaled they intend to assess penalties in the future.

Agencies request expansion to mental health parity protections and enforcement

To date, the Agencies have generally focused on voluntary compliance with enforcement efforts, resulting in voluntary prospective correction by plan sponsors and insurance carriers. While we wait to see how/if the Agencies will impose penalties, the Report makes it clear that the Agencies believe they should have enhanced enforcement authority. The DOL requested the following amendments to enhance its authority and available remedial action against noncompliant plans:

- Amend ERISA to give DOL authority to assess civil monetary penalties for parity violations;[4]
- Amend ERISA to expressly provide the DOL with the authority to directly pursue parity violations against insurance carriers and TPAs;

[4] While the DOL does not have the authority to assess civil monetary penalties for parity violations, the IRS may impose a $100 per day for each individual to whom a failure relates, subject to certain limitations and exceptions.

- Amend ERISA to expressly provide that impacted individuals, as well as DOL on their behalf, may recover amounts lost by participants and beneficiaries who wrongly had their claims denied in violation of MHPAEA; and

- Consider permanent expansion to access to telehealth and remote care services for health care and MH/SUD services.

If their proposals to Congress are any indication of how the Agencies are viewing NQTL failures, employers subject to enforcement action may be in for a rude awakening upon findings of noncompliance.

Agencies draw a line in the sand on ABA therapy limitations

The DOL recently began scrutinizing Autism coverage and ABA therapy limitations. One of the three working groups established for the national 2021 MHPAEA enforcement project focused used on autism coverage and looked at both QTLs and NQTLs applied by plans to limit or exclude coverage for ASD. Much of the working group's efforts resulted in self-assessment requests and reviews, which explains why ABA therapy limitations was one of the most common NQTLs included in the Agencies' self-assessment requests. The Report does not explain why the Agencies paid additional attention to ASD treatment limitations (and ABA therapy in particular), but it is likely recent case law had a part to play.

A California federal district court ruled in *Doe v. United Behavioral Health*[5] that a plan's total exclusion of ABA therapy was a prohibited NQTL because ABA therapy is a core treatment for autism and there were no similar exclusions for core treatments of medical/surgical benefits. Since the plan covered autism services, the plan created a more restrictive NQTL for MH/SUD benefits.

The *Doe* decision, which purported to prohibit blanket ABA therapy exclusions for plans covering ASD as a MH/SUD benefit, appeared to be an outlier decision binding only in North California since no other court previously interpreted the MHPAEA in the same manner. The prevailing view had been that a complete exclusion of a particular service (for both MH/SUD and medical/surgical conditions) complied with MHPAEA, and the DOL had never taken a formal position. Since the District Court's opinion had limited reach, and all prior DOL written guidance was silent as to whether blanket exclusions were permissible, there was an understood argument that MHPAEA allowed a total exclusion of ABA therapy.[6]

In the Report, the DOL effectively drew a line in the sand on ABA therapy limitations and exclusions, documenting their agreement with the Court's decision in *Doe v. United Behavioral Health*. The DOL took the stance that since ABA therapy is a primary treatment for ASD, any plan that covers ASD as a MH/SUD benefit must cover ABA therapy to comply with MHPAEA. Since ABA therapy limitations are a clear area of focus, the Agencies will undoubtedly continue to look into plans and carriers that impose ABA therapy exclusions. Agencies are requesting information from service providers on plans that impose these limitations as well as those that are proactively taking corrective action to remove such exclusions. It is likely the DOL will target audits based on this information, so it may be wise for plans covering ASD that completely exclude ABA therapy to reach out to their carriers in order to avoid DOL scrutiny.

The Agencies reached similar conclusions for other exclusions identified earlier in this Alert, but it does not appear they are receiving the same level of attention.

[5] See *Doe v. United Behavioral Health* (N.D. Cal. March 5, 2021)

[6] Prior to the release of the Report, none of the written guidance released by DOL required coverage of a particular treatment for a mental health condition, even if it was a primary treatment for the condition. Instead, written guidance only required that if coverage for a particular condition is provided, coverage for that condition must be provided in all six categories of services.

Next steps

Compliance with MHPAEA is nothing new for group health plans but the new self-assessment requirement has proven to be an unforeseen obstacle for many plans. While carriers are responsible for MHPAEA compliance for fully-insured plans, employers with self-funded plans are ultimately responsible for MHPAEA compliance.

This new insight into the Agencies' recent enforcement of NQTLs may force plans to re-evaluate their current plan designs and approach toward the self-assessment requirement.

Prepare for Agency enforcement (But how?)

The Report makes it abundantly clear that plans have not been complying with the self-assessment requirement. Completion of the self-assessment has been a heavily contested issue ever since the CAA was passed. Employers have tried coordinating with their TPAs to complete the assessment for them, or at least get the TPAs to provide the information necessary to the plan to complete the assessment themselves. So far, these efforts have met little success. Most TPAs have taken one of two approaches to date:

1. Commit to providing a completed self-assessment only after an Agency requests information; or

2. Provide a standard two-column analysis to plans to meet the self-assessment requirement with no detailed analysis supporting parity or direct linkage to analysis supporting parity.

The Agencies specifically rejected both approaches calling them unprepared and issued letters of insufficiency. The Agencies did not have sympathy for employers who thought their TPA was going to provide them with a sufficient self-assessment but did not or that provided an insufficient self-assessment. The Agencies also generally rejected requests for extensions related to unpreparedness.[7] The Agencies argued there was ample warning about the compliance obligations, and that the NQTL parity rules have been in existence for years. The Agencies also pointed out that plans should perform and document the analysis before implementing the NQTL.

For now, we have found few viable solutions to assist employers with compliance for their self-insured medical/Rx plans. This is generally an industry-wide problem. In addition to a shortage of third parties offering solutions that may or appear to satisfy the Agencies' demands, those third parties do not have the bandwidth to assist more than a small fraction of self-insured plans in any given year.

Ultimately, we believe the TPAs will re-think their approaches and become the primary solution, but it is not clear that this will occur in 2022. Theoretically, an employer could prepare its own self-assessment by using the DOL's Self-Compliance Tool, but this still requires significant assistance from the TPA and we believe few employers have the technical ability to complete the tool on their own.

Not all plan designs are equal

The Agencies tipped their hand regarding their interpretation of MHPAEA as it applies to NQTLs. If a service is the primary or integral part of treatment for an MH/SUD condition, they expressly took the position that the service should be covered and not subject to greater limitations than the limitations imposed on primary or integral treatments for medical/surgical conditions. This means the Agencies will generally reject blanket exclusions of primary MH/SUD treatments.

[7] The Agencies reported that 40% of the plans investigated request an extension upon receipt of the Agency's initial request for information. Extension requests are only granted when the plan can demonstrate a legitimate reason for an extension and being unprepared is not one.

Employers with self-insured medical/Rx plans imposing certain blanket exclusions for MH/SUD benefits have a decision to make. Should the plan's exclusion be challenged, are they prepared to fight and defend the exclusion? Based on an employer's risk tolerance there are three options to consider:

- Keep the plan as is, including blanket exclusions of primary treatments for covered MH/SUD conditions.
- Remove all blanket exclusions of primary treatments for covered MH/SUD conditions. Any limitations on those treatments can be no more restrictive than primary treatments for medical/surgical conditions.
- Remove coverage for the specific MH/SUD condition altogether (i.e. exclude all autism or opioid use disorder coverage). Although this addresses the potential parity issue, it would obviously be an unintended outcome from the Agencies' position. If this occurs with any frequency, we wonder if it will lead the Agencies to modify their stance or other action.

We recommend employers wishing to keep these exclusions consult with their legal counsel. We expect some TPAs will require certifications or a hold harmless agreement from an employer in order to continue administering these exclusions. Employers may also consider reaching out to their TPAs for their opinion on whether the plan and its administration satisfy the parity rules.

On the horizon…

All of the following have begun to occur or will occur in 2022:

- The 2022 NQTL self-assessment audit request letters began appearing in February.
- The CAA requires the Agencies to issue regulations for the NQTL self-assessment process, and these must appear by June.
- The DOL will issue a new self-compliance assessment tool this summer.
- The Agencies (and the parity rules) will require plans to notify participants of their NQTL compliance failures.
- The Agencies' next MHPAEA report to Congress is due in October.

We hope the Agencies will provide much needed clarification on what a compliant self-assessment looks like, as well as provide further insight into the Agencies' overall enforcement process for the NQTL self-assessment requirement.

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