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Employee Benefits Compliance

Agencies Issue Long Awaited Guidance on Mental Health Parity Compliance with New Requirements for Plan Sponsors

Introduction

On July 25, 2023, the Departments of Labor, Treasury, and Health and Human Services (collectively, the Departments), issued proposed rules implementing and expanding the nonquantitative treatment limitation (NQTL) comparative analyses requirements under the Mental Health Parity and Addiction Equity Act (MHPAEA), as amended by the Consolidated Appropriations Act, 2021. (See [Alert 2020-23, Year-End Appropriations Act Details New Requirements Under Mental Health Parity.](#))

Specifically, these proposed rules would:

- Amend the existing NQTL standards to require a new three-part test to impose an NQTL on Mental Health and Substance Use Disorder benefits. Plans and issuers would be required to follow similar steps to those that apply when analyzing parity with respect to financial requirements or quantitative treatment limitations, meet certain design and application requirements, and collect and evaluate relevant data to assess the impact of NQTLs on access to Mental Health and Substance Use Disorder benefits as compared to Medical/Surgical benefits.
- Create content requirements for the NQTL comparative analysis and specify how plans and issuers must make these comparative analyses available to the Departments, as well as to an applicable State authority, and participants, beneficiaries, and enrollees. Notably, under the proposed rules, the plan's named fiduciaries must certify the NQTL comparative analysis.
- Set a special rule regarding network composition.
- Implement the sunset provision for self-funded, non-Federal governmental plan elections to opt out of compliance with MHPAEA, as adopted in the Consolidated Appropriations Act, 2023.

Along with these proposed rules, the Departments issued a host of additional information, including a [Technical Release](#), a [News Release](#), an [Enforcement Fact Sheet](#), and the second [MHPAEA Comparative Analysis Report](#) to Congress since the enactment of the CAA, 2021. The 2023 MHPAEA Report to Congress notes that nearly all of the comparative analyses reviewed by the Departments contained insufficient information upon initial receipt and identifies common deficiencies in the comparative analyses prepared by plans and issuers. The proposed rules are intended to address that issue by providing clear standards on how to comply with MHPAEA and set statutory requirements to ensure plans and issuers properly perform and document their NQTL comparative analysis. The Department has requested comments on numerous aspects of the proposed rules, which are due 60 days after publication in the Federal Register. Employer plan sponsors interested in submitting comments should do so before the end of September.

Background

Under longstanding Mental Health Parity rules, group health plans that cover Mental Health (MH) or Substance Use Disorder (SUD) benefits must ensure that any financial requirements (copays, deductibles, etc.), quantitative treatment limits (visit limits), and non-quantitative treatment limits (NQTL) (medical management standards, network access, and formulary design) applicable to MH/SUD benefits are not more restrictive than the requirements or limitations for Medical/Surgical benefits (MS). An NQTL is any provision that limits the scope or duration of benefits for treatment that is not a quantitative treatment limitation. The Appropriations Act of 2021 requires plans to complete an NQTL comparative analysis and, upon request, provide the analysis to the DOL (or appropriate Department) as well as relevant State authorities. The Departments later released FAQs [Part 45](#) setting forth what the comparative analysis must include, what documents plans should be prepared to make available upon request, practices to avoid, and a timeline for corrective action. (See [Alert 2021-08](#), DOL FAQs Address MH Parity Requirements under the Appropriations Act.)

New Approach for NQTL Comparative Analysis

Requirements to Impose an NQTL

The proposed rules reinforce that plans and issuers are prohibited from designing or implementing NQTLs that impose greater limits on access to MH and SUD benefits as compared to MS benefits and add certain new requirements for issuers and plan sponsors related to their NQTL analyses. Under the proposed rule, subject to two narrow exceptions, plans and issuers would not be permitted to impose an NQTL unless it meets a three-part test, discussed in detail below.

Part 1: Substantially All and Predominant Test

A plan or issuer may not apply any NQTL to MH or SUD benefits in any classification that is more restrictive, as written or in operation, than the predominant NQTL that applies to substantially all MS benefits in the same classification. For purposes of NQTLs, the “predominant” variation would be the most common or frequent variation of the NQTL that applies to the highest portion of all MS benefits within a classification that are subject to the NQTL based on expected plan payments.

In order to analyze the impact of the NQTL in operation, plans and issuers would now be required to follow similar steps to those that apply when analyzing parity with respect to financial requirements or quantitative treatment limitations. These steps involve using plan level claims and data to determine the portion of plan payments for MS benefits subject to an NQTL in a classification; whether the NQTL applies to substantially all MS benefits in the classification; the predominant variation of the NQTL that applies to MS benefits in the classification; and whether the NQTL, as applied to MH and SUD benefits in the classification, is more restrictive than the predominant variation of the NQTL as applied to substantially all MS benefits. Requiring this type of evaluation as part of the NQTL comparative analysis adds complexity to the process and will likely require significant engagement and support from third party administrators and/or vendors for employer plan sponsors to comply.

Part 2: Design and Application Test

A plan or issuer may not impose an NQTL with respect to MH or SUD benefits in any classification unless any processes, strategies, evidentiary standards, or other factors used in designing and applying the NQTL to MH or SUD benefits in the classification are comparable to, and are applied no more stringently than, those applicable to MS benefits in that classification. The plan or issuer must also ensure that no factor or evidentiary standard discriminates against MH or SUD benefits as compared to MS benefits.

Part 3: Evaluate Relevant Data

The plan or issuer will be required to collect, evaluate, and consider the impact of certain data relative to access to MH and SUD benefits against access to MS benefits under the terms of the plan. A material difference in access to MH and SUD benefits is a strong indicator of a non-compliant plan design. The plan or issuer is required to take reasonable action as necessary to address any material differences in access shown in the data.

If a plan or issuer fails to meet any of these three requirements with respect to an NQTL in a classification, the NQTL would violate MHPAEA and may not be imposed on MH or SUD benefits in that classification, and the plan or issuer must make changes to the way in which the NQTL is designed or applied to ensure compliance with MHPAEA.

Comparative Analysis Requirements

The Six Elements

The proposed rules require that a comparative analysis include, at a minimum, with respect to each NQTL imposed under a plan or coverage option, six specific elements:

1. **A description of the NQTL.** Plans must prepare a written list of all NQTLs imposed under the plan or coverage that includes a general description of any information considered or relied upon by the plan or issuer in preparing the comparative analysis for each NQTL.
2. **The identification and definition of the factors used to design or apply the NQTL.** Plans are required to identify and define all the factors considered or relied upon to design or apply the NQTL, as well as the evidentiary standards or sources (if any) from which each evidentiary standard was derived, in determining which MH or SUD benefits and which MS benefits are subject to the NQTL.
3. **A description of how factors are used in the design or application of the NQTL.** Where the application of a factor depends on specific decisions made in the administration of benefits, the comparative analysis would be required to provide information on the nature and timing of the decisions, and the professional designations and qualifications of each decision maker. This element requires addressing any deviation(s) or variation(s) from a factor, its applicability, or its definition, such as how the factor is used differently to apply the NQTL to MH and SUD benefits as compared to MS benefits, and a description of how the plan or issuer establishes such deviations or variations.
4. **A demonstration of comparability and stringency, as written.** The comparative analysis should demonstrate how the factors are comparably applied, as written, to MH or SUD benefits and MS benefits in each classification, to determine which benefits are subject to the NQTL as well as an explanation of how the plan or issuer ensures that, in operation, the processes, strategies, evidentiary standards, or other factors used in designing and applying the NQTL to MH or SU benefits in a classification are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, or other factors used in designing and applying the NQTL with respect to MS benefits.

5. **Findings and conclusions.** The comparative analysis must address any findings or conclusions indicating that the plan or coverage is not (or might not be) in compliance, including any actions the plan or issuer has taken or intends to take to address any potential areas of concern or noncompliance.
6. **For ERISA plans, certification by named fiduciaries.** The comparative analysis would be required to include a certification by one or more named fiduciaries who have reviewed the analysis, stating whether they found the comparative analysis to be in compliance with the content requirements of these proposed rules. Third Party Administrators (TPAs) of self-funded health plans may be fiduciaries with respect to private employment-based group health plans and subject to the provisions governing fiduciary conduct and liability, including the provisions for co-fiduciary liability under ERISA section 405.

Network Composition Data

The proposed rules require that, in addition to the relevant data required for all NQTLs, plans and issuers must collect and evaluate additional relevant data for NQTLs related to network composition. The data would include, but would not be limited to, in-network and out-of-network utilization rates (including data related to provider claim submissions), network adequacy metrics (including time and distance data, and data on providers accepting new patients), and provider reimbursement rates (including as compared to billed charges). Material differences in access to MH and SUD benefits as compared to MS benefits may be, but are not necessarily, an indicator of noncompliance. The Departments note that material differences in access shown by outcomes data should be subject to a higher level of scrutiny than other NQTLs. If a plan or issuer must take action to address differences in access to comply with MHPAEA in operation, documentation of such action should be included in the comparative analysis.

The Departments also issued [a Technical Release](#) that sets out principles and seeks public comment to inform future guidance on the proposed rules related to network composition data. The technical release notes that the Departments intend to create an enforcement safe harbor with respect to NQTLs related to network composition for plans and insurers that meet or exceed specific data-based standards, and the tri-agencies request comments on such a safe harbor. From a practical perspective, compliance with this provision will necessarily fall to insurance carriers and TPAs.

Provision of Comparative Analysis and Notices

Provision to the Departments or State Authorities

The proposed rules state the requirement to perform and document comparative analyses of the design and application of NQTLs is not dependent upon a request by the Secretary or an applicable State authority and plans and issuers should not wait for a request from the Secretary or applicable State authority to perform and document their comparative analyses. This development may impact the approach employer plan sponsors have taken with respect to performing their NQTL analysis, many of whom have taken a wait and see approach to this compliance requirement.

The proposed rules establish a process by which the Departments request the comparative analysis, and certain timelines for issuer and plan responses, as well as sufficiency of the analysis and compliance determinations. There are a number of steps and timelines to this process, but employer plan sponsors should specifically take note that if the Secretary requests the comparative analysis, they would be required to provide the analysis within 10 business days of the receipt of request.

Sunset of MHPAEA Opt Out for Self-Funded Non-Federal Governmental Plans

Prior to the enactment of the CAA, 2023, self-funded non-federal governmental plans could elect to opt out of compliance with the requirements under MHPAEA. However, the CAA, 2023, enacted on December 29, 2022, provides that no MHPAEA opt-out election may be made on or after the date of the enactment of the CAA, 2023, and that generally, no MHPAEA opt-out election expiring on or after the date that is 180 days after the date of such enactment may be renewed. The CAA, 2023 included an exception for certain collectively bargained plans with an opt-out election in effect for MHPAEA that allows for a longer transition to come into compliance with MHPAEA. A plan subject to multiple collective bargaining agreements of varying lengths that has a MHPAEA opt-out election in effect as of the date of enactment of the CAA, 2023, that expires on or after the date that is 180 days after the enactment of the CAA, 2023, may extend the opt out until the date on which the term of the last such agreement expires.

Effective Dates

The proposed rules, if finalized, would become effective for plan years beginning on or after January 1, 2025. However, it is important to note that the requirement to provide a comparative analysis took effect on February 10, 2021, and that the applicability date for these proposed rules does not alter current obligations under the statute.

Conclusion

These proposed rules include an abundance of new content requirements for the NQTL comparative analysis. It is important that employers reach out to insurance carriers, TPAs, and any vendor partners

supporting carved out benefits (e.g., Pharmacy Benefit Managers) to determine how they will help employer plan sponsors comply with these new rules if finalized.

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