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State, Federal, and Private Enforcement of Mental Health Parity Compliance

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Six months ago, we cautioned health plans and plan sponsors that states, the federal government, and private litigants were laser focused on Mental Health Parity and Addiction Equity Act ("MHPAEA") compliance. The United States Department of Labor ("DOL") investigated and closed 127 health plan investigations related to MHPAEA in FY 2020. Given the changes announced in the Consolidated Appropriations Act, 2021 ("CAA"), and subsequent guidance, we expect heightened scrutiny of MHPAEA compliance from states, the federal government, and private parties.

State and Federal Enforcement

Indeed, this August, the DOL filed a complaint United Behavioral Health and UnitedHealthcare Insurance Company (collectively "United") in the U.S. District Court for the Eastern District of New York. The complaint alleged that United violated MHPAEA and breached its fiduciary duties under ERISA by: (1) reimbursing out-of-network mental health services more restrictively than out-of-network medical and surgical services; and (2) applying concurrent review to outpatient mental health benefits more broadly and more aggressively than programs for medical and surgical benefits. The complaint also alleged that United did not provide details on the reimbursement rate reduction or concurrent review program to plan sponsors, participants, or beneficiaries in violation of ERISA's disclosure requirements. The New York State Attorney General ("NYAG") filed a parallel compliant. The DOL and NYAG complaints alleged that the conduct at issue dated to at least 2013.

Significantly, that complaint marked the first federal enforcement action related to MHPAEA compliance since enactment. United, DOL, and the New York State Attorney General filed a stipulated settlement resolving those claims concurrently with the complaints. United also settled putative class actions that alleged MHPAEA violations premised on the same reimbursement reductions applied to out-of-network mental health services alleged in the DOL and NYAG complaints. Those private lawsuits had been filed in 2017 and 2018. The settlement agreement would require United to pay $10 million to resolve the reimbursement claims, $3.6 million to resolve the concurrent review claims, and an additional $2 million in penalties. The private parties' attorneys are seeking $3.1 million in attorneys' fees [see Doe Fee Memo here] in addition to the $10 million for the reimbursement claims.

The United litigation demonstrates just how high the stakes are for health plans and plan sponsors.

The DOL, state insurance regulators, state attorneys general, and private parties have an array of tools to probe a plan's compliance with MHPAEA. ERISA's disclosure obligations require health plans to provide their comparative analysis demonstrating MHPAEA compliance to individuals or their authorized representatives and the DOL previously issued a model disclosure request form to facilitate these requests. The CAA further broadened disclosure and access requirements for plan beneficiaries to scrutinize compliance analysis. And the price transparency rules will give yet another tool for providers, beneficiaries, and regulators to evaluate reimbursement rates for potential parity compliance.

Another Putative Class Action Challenging Coverage Guidelines

Last month, a putative class action was filed against Aetna Life Insurance Company ("Aetna") in the U.S. District Court for the Central District of California, the same jurisdiction in which the class actions *Wit et al. v. United Behavioral Health* and *Alexander et al. v. United Behavioral Health* ("*Wit* and *Alexander*") were decided, with somewhat similar allegations.
In *Wit* and *Alexander,* United Behavioral Health was found to have breached its fiduciary duties under ERISA to over 50,000 insureds by denying their mental health and substance use disorder claims allegedly based on pervasively flawed medical necessity criteria. *Wit* and *Alexander* are currently on appeal to the Ninth Circuit Court of Appeals.

The complaint filed in *Deighton v. Aetna Life Insurance Company* alleges that Aetna breached its fiduciary duties under ERISA because its internally developed coverage guidelines favor Aetna's interests over the plan participants, and that Aetna applies disparate requirements to cover residential treatment facilities and rehabilitation facilities in violation of MHPAEA.

Plaintiff Joshua Deighton has a son with autism whom he placed in a residential treatment facility. Aetna allegedly denied Plaintiff's claim for reimbursement for the cost of the facility, in addition to two of his subsequent appeals. The complaint alleges Aetna violated MHPAEA by requiring accreditation standards on behavioral health residential treatment facilities without a comparable requirement for medical health rehabilitation facilities. Plaintiff argues that because a behavioral health residential treatment facility falls under the same level of care as a medical rehabilitation facility, Aetna cannot place more stringent requirements on behavioral health facilities offering the same level of care without violating the parity requirements of MHPAEA.

The complaint also alleges that Aetna improperly denied benefits when it based its denial, in part, on the facility's failure to meet the Aetna Plan's requirement that a behavioral health provider be "actively on duty 24 hours per day for 7 days a week." Plaintiff argues that this basis is unjustified because the facility did employ medical and behavioral health professionals actively on-duty and on-call 24 hours per day, and that Aetna's overly restrictive interpretation of otherwise ambiguous plan language—specifically that the provider be on-site—is a breach of its fiduciary duty under ERISA. Plaintiff further alleges that Aetna's requirement that the facility maintain a behavioral health provider on-site 24/7, as well as other restrictions for coverage, violate generally accepted standards of care.

Ultimately, with the government stepping up and continued private action, health plans and plan sponsors face mounting pressure to examine their practices for compliance with parity requirements in the MHPAEA. Failure to take action could lead to time consuming and costly litigation, government penalties, public shaming, and large settlements.

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