

# What Employers Need to Know about the Mental Health Parity Proposed Regulations

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On July 25, 2023, the tri-agencies of the Departments of Treasury, Labor, and Health and Human Services (the Departments) issued a [compendium of guidance](#) designed to facilitate compliance with the Nonquantitative Treatment Limitation (NQTL) comparative analysis requirements added by the Consolidated Appropriations Act, 2021 (CAA, 2021) as they relate to the Mental Health Parity and Addiction Equity Act (MHPAEA). The guidance signals that employer-sponsored group health plans will have some work to do to improve their mental health and substance abuse treatment provider networks, their data collection efforts to better evaluate the parity in care, and the production of sufficient NQTL comparative analysis reports.

## Provider Access

The guidance is massive and will take time for employers, insurers, and advisors to distill. But, it is clear the Departments have identified access to mental health and substance abuse disorder treatment as a root cause for what they describe as “a mental health and substance use disorder crisis that worsened during the COVID-19 pandemic.” As noted in the preamble, “ensuring that people seeking mental health and substance use disorder treatment do not face greater barriers to access to benefits for such treatment is central to the fundamental purpose of MHPAEA.”

To implement this purpose, the regulations require plans or issuers to collect, evaluate, and consider the impact of data on access to mental health and substance abuse benefits before imposing an NQTL in a care classification. Obtaining data has been one of the greatest challenges of the NQTL comparative analysis requirement. The Departments recognize this and specifically request comments on how best to ensure plans and issuers can obtain the information they need from all the entities involved in designing and administering the plan in support of their MHPAEA compliance efforts.

## Special New Rule Focused on Network Composition

The preamble notes that “[a] key component of access is the availability of an adequate number of appropriate providers within a plan’s network.” Citing a [Millman 2019 report](#) that points to a growing disparity of in-network reimbursement rates for primary care providers versus those providing behavioral health care, the proposed regulations conclude that low rates coupled with the high

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demand for services are negatively impacting access to care. Suppose covered persons cannot access an in-network mental health or substance abuse disorder provider due to limited options, travel, scheduling challenges, or otherwise. In that case, they may not seek the care they need, with the resultant data showing a lack of parity with medical/surgical benefits.

Therefore, the proposed regulations require that plans and issuers collect and analyze network adequacy data and provider reimbursement rates. Realizing plans and issuers may face significant challenges in ensuring their mental health and substance abuse disorder networks are not more restrictive than their medical/surgical networks, the Departments are soliciting comments in the proposed regulations and the accompanying [Technical Release 2023-01P](#) on ways to evaluate parity in networks, including the prospect of a potential enforcement safe harbor for plans and issuers that include data related to network composition in their comparative analyses.

## **New NQTL Comparative Analysis Content Requirements.**

The guidance also builds on the [2020 Self-Compliance Tool](#) to address specific content and delivery requirements related to the required NQTL comparative analysis and establishes minimum data collection requirements. In their [July 2023 Report to Congress](#), the Departments again describe the failing grade they are giving the plans related to the NQTL comparative analysis requirements. From not including sufficient information in the initial report to waiting to start the comparative analysis when the investigation began, plans and issuers are not meeting expectations.

The proposed regulations attempt to bridge this gap, describing specific data and information that is required to be included in the NQTL comparative analysis and specifying when and how the reports must be provided. This falls short of the safe harbor many hoped would be included in the implementing guidance, but the insight is generally welcome.

## **Definitions. Examples. And Standards. Oh My!**

The 395 pages of [proposed regulations](#) also include countless definitions, examples, and guidelines. They shed light on what the Departments believe to be the problem areas.

For example, there are specific examples addressing Applied Behavior Analysis (ABA) Therapy. If a plan excludes ABA therapy, a primary treatment for autism spectrum disorder, and that exclusion is separately applicable to autism spectrum disorder benefits and does not apply to any medical or surgical benefits in the same classification, the Departments believe this is a prohibited treatment limitation.

## **The regulations are not yet the law.**

The regulations are proposed in form, and the Departments seek stakeholder comments that may result in minor or significant refinements. Employers, therefore, should simply begin to digest these vast resources with their advisors with a keen focus on their network providers. Again, access to mental health and substance abuse disorder care appears to be the number one driving force.

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