

Mental Health Parity Compliance Remains a Key Focus for Federal Agencies

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On July 25, 2023, the U.S. Department of Labor (DOL), the U.S. Department of Health and Human Services (HHS), and the U.S. Department of the Treasury released their annual report to the U.S. Congress regarding group health plans' and insurance carriers' compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA). The report includes a number of points of interest for employers.

Quick Hits

- The DOL, HHS, and Treasury Department released their annual report to Congress regarding group health plans' and insurance carriers' compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA).
- The agencies stated that MHPAEA is a “top enforcement priority,” with a focus on nonquantitative treatment limitations.
- None of the initial comparative analyses the agencies received were sufficient to demonstrate compliance, the agencies said.

Background

Under MHPAEA, group health plans that offer mental health and substance use disorder (MH/SUD) benefits must provide those benefits on no-less-generous terms than they provide medical and surgical benefits. Plans must make various comparisons between MH/SUD and medical/surgical benefits to ensure both types of benefits are treated similarly. The departments' recent enforcement focus has been on one category of comparison: nonquantitative treatment limitations (NQTLs). NQTLs are limits on treatment that are not numerical—for instance, medical management techniques and provider network admission criteria.

The [Consolidated Appropriations Act, 2021](#) requires employers to perform and document compliance

with MHPAEA’s NQTL requirements through “comparative analyses.” Employers have found these comparative analyses to be quite burdensome to compile, as the data required can be extensive and is not always within their control, and analysis of that data can be very difficult.

The departments’ new [119-page report](#) covers enforcement activities by both DOL (through the Employee Benefits Security Administration (EBSA) for private employer plans and insurance carriers) and HHS (through the Centers for Medicare and Medicaid Services (CMS) for nonfederal government plans and insurance carriers).

Increased Enforcement Efforts

The report emphasizes that MHPAEA is a “top enforcement priority.” EBSA noted that it has increased staffing and training related to MHPAEA. Between February 2021 and July 2022, it sent out 182 initial letters requesting comparative analyses of more than 450 NQTLs, and it initiated 102 separate investigations. CMS, for its part, sent out twenty-six letters requesting comparative analyses from twenty-four plans and issuers between February 2021 and September 2022.

Employers that are investigated can expect a lengthy process. EBSA indicated it sent 138 insufficiency letters, fifty-three initial determination letters that plans and issuers had violated MHPAEA, and three final determination letters finding MHPAEA violations. (CMS issued five final determination letters of noncompliance.) The investigations are time-consuming and often involve multiple rounds of interviews (or “conferences” in CMS investigations), depositions, document requests, data requests, and subpoenas. Investigations can take one or more years to complete.

Even so, EBSA and CMS reported that plans made MHPAEA-related corrections at all stages of the enforcement process, so some investigations lasted longer than others. Furthermore, the majority of these corrections did not require determinations of noncompliance. However, plan sponsors and insurance carriers receiving final determinations of noncompliance were required to notify all plan participants that coverage was determined to be not in compliance with MHPAEA.

NQTL Enforcement Priorities

EBSA pointed to six specific NQTLs on which it is particularly focused, adding two new ones to the four it identified in the January 2022 [report](#):

1. “Prior authorization requirements for in-network and out-of-network inpatient services;
2. Concurrent care review for in-network and out-of-network inpatient and outpatient services;
3. Standards for provider admission to participate in a network, including reimbursement rates;
4. Out-of-network reimbursement rates (methods for determining usual, customary, and reasonable charges);
5. Impermissible exclusions of key treatments for mental health conditions and substance use disorders” (new since 2022); and
6. “Adequacy standards for MH/SUD provider networks” (new since 2022).

EBSA said it has given greater priority to NQTLs related to network adequacy, highlighting a particular focus on the composition of provider networks and participation standards (including the way plans set their provider reimbursement rates and plans' efforts to monitor the adequacy of those networks).

CMS NQTL enforcement priorities included the following:

1. prior authorization treatment limitations for in-network and out-of-network inpatient and outpatient services;
2. concurrent care review for in-network and out-of-network inpatient and outpatient services; and
3. "exclusions of specific treatments for certain conditions in the prescription drug classification" (new since 2022).

Sufficiency of Comparative Analyses

The agencies concluded that none of the initial comparative analyses they received in response to their requests sufficiently demonstrated compliance. In particular, the agencies are looking for comparative analyses that:

- provide more explanation of how factors were applied when determining which benefits are subject to an NQTL;
- "[d]emonstrate if or how factors were comparably applied to MH/SUD benefits and medical/surgical benefits";
- "[a]dequately explain how an NQTL was applied in operation"; and
- "[d]emonstrate that, in operation, the NQTL was comparably applied to both MH/SUD and medical/surgical benefits."

The report also states that many plans were "initially unprepared" to deliver comparative analyses. EBSA said it has made "extraordinary efforts" to allow plans to supplement the initial submissions. However, the report also indicated that EBSA would expect more complete comparative analyses and quicker correction of insufficient analyses going forward.

Conclusion

Based on the agencies' report, MHPAEA will continue to be a top enforcement priority. Employers that wish to forestall drawn-out investigations may want to carefully review the agencies' enforcement priorities and address issues with comparative analyses identified in the report.

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