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Proposed Mental Health Parity Guidance Would Impose Burdensome Disclosure Requirements

Article By:

Damian A Myers

On April 23, 2018, the Departments of Labor (DOL), Health and Human Services (HHS) and Treasury (together, the "Agencies") released proposed frequently asked questions ("FAQs") related to required disclosures and nonquantitative treatment limitations ("NQTLs") under the Mental Health Parity and Addiction Equity Act ("MHPAEA"). The Agencies also released a self-compliance tool to help plans, plan administrators and plan sponsors assess their compliance with the MHPAEA.

The new guidance contains too much information to cover in a single blog, so this is the first of three blogs covering the guidance. In this entry, we highlight the Agencies' proposed rule that would require plan administrators to distribute hard copy health care provider lists when the ERISA electronic disclosure standards cannot be met. This proposed requirement deviates from the standard practice of directing plan participants to network administrator websites for provider lists and would be sure to significantly increase administration costs.

Background

The MHPAEA requires that group health plans provide mental health and substance abuse benefits in parity with medical and surgical benefits. Although the requirements are complex (a summary can be found here), the basic structure of the law is that both quantitative limitations (e.g., dollar and visit limits) and nonquantitative limitations (e.g., medical management techniques) applied to mental health and substance abuse benefits must be the same or better than the predominant limitations applied to substantially all medical and surgical benefits. This "predominant/substantially all" requirement applies on a classification-by-classification basis, based on six classifications of benefits: (i) inpatient, in-network; (ii) inpatient, out-of-network; (iii) outpatient, in-network; (iv) outpatient, out-of-network; (v) emergency care; and (vi) prescription drugs.

The 21st Century Cures Act enacted in 2016 mandated that the Agencies issue guidance with respect to disclosures related to NQTLs and application of the NQTL parity requirements. The first set of Agency guidance under this direction was released in June 2017 as FAQs about Mental Health and Substance Abuse Disorder Parity Implementation and the 21st Century Cures Act, Part 38. Those FAQs addressed parity requirements related to eating disorders and included a draft model form request for disclosure of treatment limitations. The Agencies' most recent proposed guidance, Proposed FAQs about FAQs about Mental Health and Substance Abuse

Disorder Parity Implementation and the 21st Century Cures Act, Part 39 ("FAQs Part 39"), builds upon prior mental health parity guidance.

Disclosure Obligations

Prior agency guidance has made clear that plans must disclose information related to NQTLs when that information is requested by participants, and FAQs Part 39 updates the model request form for participants. Perhaps the most surprising aspect of FAQs Part 39 was the proposed guidance regarding disclosure of the healthcare provider network in a plan's summary plan description ("SPD"). The question related to availability of a psychiatrist within a network, but the implications of the Agencies' proposed response goes beyond mental health services.

As a general matter, the DOL regulations setting forth the content requirements for SPDs state that the SPD must contain a description of the "composition of the provider network." Changes to the provider network would also require a summary of material modifications describing the changes within 210 days following the year in which the changes occurred.

The DOL regulations also state that the list of in-network providers can be provided in a separate document as long as the SPD contains a general description of the provider network and a statement that the list of the network providers is automatically provided in a separate document. Although separate hard copy network provider books once existed, for years, insurance carriers and network administrators have given participants access to the provider lists through the carrier's or administrator's website. SPDs now often give a general description of the network and provide a URL address for the provider list website.

FAQs Part 39 contains guidance that is generally consistent with that described above with one major exception. Proposed Q&A 12 states that SPDs are permitted to direct participants to the network administrator's website only if the DOL's electronic disclosure safe harbor requirements are met. In general, the DOL's electronic disclosure rule provides that ERISA-required notices can be sent electronically only if the recipients have access to the internet as part of their day-to-day job functions. This means that employees in many industries, such as retail, hospitality, manufacturing, and transportation, would have to receive hard copy network provider books unless they affirmatively consent to receive electronic disclosures. Terminated employees and retirees who have group health coverage would also have to be provided hard copy provider lists unless they consent to receive electronic disclosures.

The inability of plans and plan sponsors to rely on network administrator websites to communicate network provider lists presents a number of problems. For instance, plans and plan sponsors generally have no control over the network structure, and network administrators are not in the practice of regularly communicating provider changes to participating plans. Providers join and leave various networks on a frequent basis, so hard copy provider lists (which could be dozens of pages long) would need to be updated and distributed, at a minimum, on an annual basis. Thus, plans and sponsors would likely face significant costs if hard copy provider lists were required.

Note that the guidance in FAQs Part 39 is proposed, and the Agencies have solicited comments (deadline is June 22nd).