

Departments Release Proposed Mental Health Parity Regulations: Key Changes for Employers

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On July 25, 2023, the Departments of Labor, Treasury, and Health and Human Services (the Departments) released a Proposed Rule under the Mental Health Parity and Addiction Equity Act (MHPAEA). The Proposed Rule was released simultaneously with Department of Labor (DOL) Technical Release 2023-01P (the “Technical Release”) and the Departments’ MHPAEA 2023 Comparative Analysis Report to Congress, which details the Departments’ fiscal year 2022 enforcement efforts. Together, these documents provide invaluable insight into the Departments’ approach to MHPAEA compliance.

MHPAEA requires group health plans (plans) and health insurance issuers (“issuers”) that cover mental health and substance use disorder (“MH/SUD”) benefits to provide such coverage in parity with medical and surgical (M/S) benefits. As a result, plans and issuers are not permitted to impose financial requirements (such as deductibles, co-pays, co-insurance, etc.), quantitative treatment limitations (QTLs) (such as limits on visits), or non-quantitative treatment limitations (NQTLs) (such as prior authorization requirements, network restrictions, provider reimbursement rates, etc.) on MH/SUD benefits that are more restrictive than the requirements applied to M/S benefits.

The Proposed Rule, if finalized, would amend the long-standing 2013 regulations under MHPAEA and introduce new guidance with respect to the NQTL comparative analyses required by the Consolidated Appropriations Act of 2021 (CAA). The Proposed Rule would apply for plan years that begin on or after January 1, 2025. Comments on the Proposed Rule (and the Technical Release) are due no later than October 2, 2023. This article describes the key areas of focus in the Proposed Rule and includes a brief summary of the Technical Release and the 2023 Comparative Analysis Report to Congress.

THREE-PART TEST FOR IMPOSING AN NQTL ON MH/SUD BENEFITS

NQTLs are non-numerical limitations on the scope or duration of a particular treatment. The Proposed Rule sets forth a new, expanded framework for establishing whether an NQTL can apply to MH/SUD benefits without violating the MHPAEA. Under the Proposed Rule, the following three requirements must be met in order for an NQTL to apply to MH/SUD benefits:

1. *Substantially All/Predominant Test*: A plan or issuer must show that the NQTL applied to MH/SUD benefits in a specific classification are no more restrictive (as written and in operation) than the predominant NQTL that applies

to substantially all (i.e., two-thirds of) M/S benefits in the same classification. This “no more restrictive” requirement is similar to the existing test for financial and QTL requirements. This rule would require an assessment of the expected dollar amount of all plan payments for M/S benefits in the classification to determine whether the particular NQTL applies to at least two-thirds of all M/S benefits. If the substantially all portion of the test is satisfied, then the NQTL applied to MH/SUD benefits must not be more restrictive, as written or in operation, than the predominant variation of the NQTL that applies to M/S benefits in the same classification. For example, if a plan applies inpatient concurrent review every one day, three days, or seven days for various types M/S inpatient stays, the plan has three variations of the concurrent review NQTL, and the plan would have to determine the frequency of concurrent review that is predominant for M/S inpatient benefits.

2. *Design and Application Requirements:* A plan or issuer must show that no factor or evidentiary standard relied on when designing or applying the NQTL to MH/SUD benefits was applied more stringently than those used in designing and applying the NQTL to M/S benefits in the same classification. In addition, the Proposed Rule would prohibit a plan or issuer from relying upon any factor or evidentiary standard if such factor or standard discriminates against MH/SUD benefits as compared to M/S benefits. Whether a factor or standard “discriminates” against MH/SUD will depend on whether it is biased or not objective, in a manner that results in less favorable treatment of MH/SUD, based on all the relevant facts and circumstances.
3. *Relevant Data Evaluation:* A plan or issuer must collect, evaluate, and consider the impact of relevant outcomes data (such as claim denial rates) on access to MH/SUD benefits relative to access to M/S benefits. If the data collected reveals material differences in access, the plan must take reasonable action to address the material differences.
 - With respect to a comparison of network composition data, plans are required to collect data on in-network and out-of-network utilization rates, network adequacy metrics, and provider reimbursement rates. If the relevant data shows material differences in access to in-network MH/SUD benefits as opposed to M/S benefits, that NQTL fails the no more restrictive, design, and application requirements.

The Proposed Rule would provide limited exceptions to the above requirements. For example, an NQTL would be exempt from all three requirements if the NQTL impartially applies generally recognized independent professional medical or clinical standards. Further, the no more restrictive requirement and the non-discrimination component of the design and application requirement would not have to be satisfied if the NQTL was reasonably designed to detect or prevent fraud, waste, and abuse and was narrowly tailored for this purpose.

MEANINGFUL BENEFITS OBLIGATION

The Proposed Rule provides that if a plan or issuer provides any benefits for a particular MH/SUD condition or disorder in a classification, it must provide meaningful benefits for treatment for that condition or disorder in each classification, as compared to the benefits provided for M/S conditions in such classification.

ADDITIONAL GUIDANCE ON REQUIRED COMPARATIVE ANALYSES

The Proposed Rule includes additional details on how plans and issuers should perform and document the NQTL analyses required by the CAA. The Proposed Rule provides the following content elements that must be included in an NQTL comparative analysis:

- A description of the NQTL;
- The identification and definition of the factors used to design or apply the NQTL;
- A description of how factors are used in the design or application of the NQTL;
- A demonstration of comparability and stringency, as written;
- A demonstration of comparability and stringency in operation; and
- Findings and conclusions.

In addition, the Proposed Rule would require that, for ERISA plans, an NQTL analysis must include a certification by one or more named fiduciaries that have reviewed the analysis, stating whether they found the comparative analysis to be in compliance with the content requirements of the Proposed Rule. The Proposed Rule would require that a comparative analysis include the date of the analysis, the title, and credentials of all relevant persons who participated in the performance and documentation of the comparative analysis. If the comparative analysis relies upon an evaluation by a reviewer or consultant considered by the plan or issuer to be an expert, the comparative analysis would be required to include an assessment of each expert's qualifications and the extent to which the plan or issuer ultimately relied upon each expert's evaluation in performing and documenting the comparative analysis.

Finally, the Departments stress that plans and issuers must be in compliance with comparative analyses requirements, regardless of whether the plan or issuer has received a request from the from the Departments to provide such comparative analyses. Further, comparative analyses must reflect the current terms of the plan or coverage. As a result, updates to comparative analyses may be required when plan terms are changed.

DOL TECHNICAL RELEASE

In conjunction with the Proposed Rule, the DOL also issued a Technical Release regarding the NQTL-related data plans and issuers must collect and evaluate to demonstrate compliance with the MHPAEA with respect to network composition. The Technical Release asks for comments on this data-driven approach and indicates that the Departments seek to provide future guidance that would define standards for such data elements and create an enforcement safe harbor for plans and issuers that provide data indicating that they are in compliance with standards related to network composition.

The Technical Release notes four types of data that the Departments would require to be collected regarding NQTLs related to network composition: (1) out-of-network utilization; (2) percentage of in-network providers actively submitting claims; (3) time and distance standards; and (4) reimbursement rates. If the Proposed Rule is finalized, the Departments will use these four types of data to determine if an NQTL related to network composition complies with MHPAEA.

2023 COMPARATIVE ANALYSIS REPORT TO CONGRESS

The Departments' 2023 Comparative Analysis Report to Congress (the Report) reveals that between February 2021 and July 2022, the DOL's Employee Benefits Security Administration (EBSA) requested comparative analyses from 182 plans and issuers. Of these requests, 138 insufficiency letters were issued, covering over 290 NQTLs. During the same period, EBSA issued 53 initial determination letters and 3 final determination letters finding MHPAEA violations. Between February 2021 and September 2022, the Centers for Medicare and Medicaid Services (CMS) issued 26 letters requesting comparative analyses from 24 plans and issuers. Of these requests, 35 insufficiency letters were issued, covering 44 NQTLs. During the same period, CMS issued 5 final determination letters finding MHPAEA violations.

The Report describes common deficiencies found among plans and issuers, including:

- Failure to prepare comparative analyses;
- Failure to describe in sufficient detail how the NQTL was designed or how it is applied in practice to MH/SUD benefits and medical and surgical benefits;
- Failure to sufficiently identify or define the factors, sources, and evidentiary standards used in designing and applying the NQTL to MH/SUD and M/S benefits; and
- Failure to demonstrate compliance with parity of NQTLs as written and in operation.

In many cases, EBSA's outreach and enforcement prompted changes to a plan or issuer's NQTL practices before EBSA reached its final determination of MHPAEA violation. The Report indicates that an appropriate corrective action depends on the NQTL, but may include:

- Removal of an NQTL;

- Amendments to plan practices or claims processing procedures;
- Addition of coverage for benefits that were previously excluded;
- Reduction in the scope of the application of an NQTL to MH/SUD benefits;
- Submission of a revised comparative analyses; and
- Re-adjudication of claims impacted by an impermissible NQTL.

The Report notes that the Departments intend to update the MHPAEA Self-Compliance Tool to reflect updated guidance.

WINSTON TAKEAWAYS

Although most employers do not have direct control over their group health plan's network composition and/or do not directly administer their plan, the Departments have stressed that even if an employer contracts with third-party administrators or other service providers to administer the plan, the employer is still obligated to ensure that the plan satisfies the requirements under MHPAEA. As a result, employers should review any existing parameters around MH/SUD benefits in their plan designs to confirm that they do not raise concerns under the new guidance. Employers should pay special attention to areas of focus highlighted in the Report, and in prior guidance, including two new "areas of priority" added to the list included in the prior January 2022 Report to Congress:

(i) impermissible exclusions of key treatments for mental health conditions and substance use disorders, and (ii) adequacy standards for MH/SUD provider networks. While the regulations are not yet final, they are an indication that the Departments are focusing on data and outcomes to demonstrate MHPAEA compliance with an end game to removing barriers to mental health and substance use disorder treatment. As a result, employers should ensure that when negotiating agreements with third-party administrators and other plan service providers, they retain broad data access and audit rights, and that the agreements contain representations that vendors will fully cooperate in disclosing data and information needed by the plan to demonstrate parity compliance.

Further, employers should confirm that the required NQTL analyses have been performed. As noted above, the Departments have emphasized that the requirement to perform and document an NQTL comparative analysis is not dependent upon an audit request. Therefore, all employers subject to these requirements should be conducting ongoing compliance efforts and be prepared to provide the Departments with a copy of such analyses upon request.

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