



National Compliance Update

USI EMPLOYEE BENEFITS

August 10, 2023

New Proposed MHPAEA Guidance Released

The Departments of Labor (“DOL”), Health and Human Services (“HHS”), and the Treasury (collectively, “the Departments”) recently published mental health parity enforcement guidance, including new proposed rules for compliance with the Mental Health Parity and Addiction Equity Act of 2008 (“MHPAEA”). The Departments seek to improve mental health and substance use disorder (“MH/SUD”) benefits in group health plans through enforcement and rulemaking, with a major focus on expanding access to in-network MH/SUD providers.

In addition, the Departments published their annual report to Congress detailing significant MHPAEA enforcement activities and efforts to work with employer plan sponsors, carriers, and third-party administrators (“TPAs”) to correct potential failures. Notably, the report highlights that significant compliance gaps with MHPAEA exist and that the enforcement of health plan requirements around MH/SUD benefits remains a top priority of the Departments.

BACKGROUND

MHPAEA applies to:

- Employers with at least 51 employees offering a group health plan that provides coverage for any MH/SUD benefits, and
- Fully insured group health plans in the small market that are required to provide all essential health benefits, including MH/SUD benefits.

Briefly, MHPAEA:

- Provides that financial requirements (such as coinsurance and copays) and treatment limitations (such as visit limits) imposed on MH/SUD benefits cannot be more restrictive than the predominant financial requirements and treatment limitations that apply to substantially all medical/surgical benefits in a classification.¹

¹ The six permitted classifications of benefits are: (1) inpatient, in-network; (2) inpatient, out-of-network; (3) outpatient, in-network; (4) outpatient, out-of-network; (5) emergency care; and (6) prescription drugs.

- Prohibits separate treatment limitations that apply only to MH/SUD benefits.
- Provides that non-quantitative treatment limitations (“NQTLs”) may not be imposed on MH/SUD benefits in any classification unless, the processes, strategies, evidentiary standards, and other factors are comparable and applied no more stringently for MH/SUD benefits than for medical/surgical benefits under the terms of the plan (or health insurance coverage) as written and in operation.
 - With respect to NQTLs, the focus is not on whether the final result is the same for MH/SUD benefits as for medical/surgical benefits, but rather on whether the underlying processes, strategies, evidentiary standards, and other factors are in parity.
- Imposes certain disclosure requirements, including a requirement that group health plans and health insurers conduct a comparative analysis of all NQTLs imposed on MH/SUD benefits and make that analysis available to the Departments and participants and beneficiaries (including their authorized representatives) upon request.²

REPORT TO CONGRESS

In July 2023, the 2023 MHPAEA Comparative Analysis Report to Congress was released indicating that between February 2021 and July 2022, the DOL issued 182 letters requesting comparative analyses for over 450 NQTLs. During its second reporting period during that time, November 2021 to July 2022, the DOL sent 25 letters requesting comparative analyses for nearly 70 NQTLs and continued to receive insufficient responses.

The Report to Congress highlights the DOL’s ongoing enforcement priorities, including two new priorities added this year:³

- Prior authorization requirements for in-network and out-of-network inpatient services;
- Concurrent care review for in-network and out-of-network inpatient and outpatient services;
- Standards for provider admission to participate in a network including reimbursement rates;
- Out of network reimbursement rates for determining usual, customary and reasonable charges;
- **NEW:** Network adequacy standards for MH/SUD providers; and
- **NEW:** Impermissible exclusions of key MH/SUD treatments, including applied behavioral analysis therapy (“ABA therapy”) for autism spectrum disorder, medication assisted treatment, and nutritional counseling for eating disorders

The DOL indicated that they have placed increased priority on NQTLs related to network adequacy, including the composition of MH/SUD provider networks and the provider reimbursement rates.

Based on their latest investigations, the DOL concluded that, once again, none of NQTL analyses were sufficient to demonstrate compliance with MHPAEA. The DOL cited the same deficiencies identified in their 2022 report to Congress⁴ and also included the following additional examples of failures:

² As previously reported, the Consolidated Appropriations Act, 2021 (“CAA”) amended MHPAEA to add this new comparative analysis for NQTLs and require the Departments to annually report on the results of their reviews of health plans comparative analysis.

³ The Departments’ 2022 report to Congress identified only four main enforcement priorities.

⁴ The Departments’ 2022 report to Congress stated that initial comparative analyses reflected the following deficiencies:

- Failure to document comparative analysis before designing and applying the NQTL,
- Conclusory assertions lacking specific supporting evidence or detailed explanation,
- Lack of meaningful comparison or meaningful analysis,

- A lack of explanation as to how factors were applied to determine what benefits would be subject to an NQTL;
- How these factors were comparably applied to MH/SUD benefits versus medical/surgical benefits;
- An explanation as to how an NQTL was applied in operation; and
- No demonstration that, in operation, the NQTL was comparably applied to MH/SUD benefits and medical/surgical benefits.⁵

The report specifically mentions that the Departments' investigations have revealed more exclusions of key treatments for MH/SUD conditions than expected, such as ABA therapy to treat autism spectrum disorder, medication-assisted treatment ("MAT"), medications for opioid use disorder ("MOUD"), and nutritional counseling for eating disorders.

USI Note. This is consistent with USI's observation of an increase in enforcement action by the DOL regarding exclusions and limitations around ABA therapy and other treatments for autism spectrum disorder and eating disorders, including subpoenaing TPAs to uncover plans with such limitations.

Overall, it appears the Departments are working with plans and issuers to achieve voluntary corrective action, including removing exclusions, ending gatekeeper programs, and removing prior authorization when no preauthorization is required for comparable medical/surgical services.

ENFORCEMENT ACTIVITY

In addition to the Report to Congress, the Departments published a 2022 MHPAEA Enforcement fact sheet. The fact sheet details enforcement beyond the NQTL comparative analysis reviews.

Specifically, as it relates to employer-sponsored group health plans investigations:⁶

- There were 145 health plan investigations in 2022 - 86 of these involved plans subject to MHPAEA.
- 18 of the 86 plans involved MHPAEA violations leading to 11 investigations (one fully insured plan, 10 self-insured plans). The violations included:
 - 3 annual/lifetime limits
 - 2 financial requirements
 - 2 Quantitative Treatment Limits ("QTLs")
 - 10 NQTLs and
- 1 final determination of noncompliance with the NQTL comparative analysis.

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- Nonresponsive comparative analysis,
 - Documents provided without adequate explanation,
 - Failure to identify the specific MH/SUD and medical/surgical benefits or MHPAEA benefit classification(s) affected by an NQTL.

⁵ CMS also identified enforcement priorities with respect to insured products, including:

- Prior authorization treatment limitations;
- Concurrent review treatment limitations; and
- **NEW:** Exclusions of specific treatments for certain conditions in the prescription drug classification.

⁶ The Employee Benefit Security Administration ("EBSA") is the agency under the DOL responsible for enforcement of ERISA. The fact sheet also summarizes CMS's enforcement actions with respect to non-federal government plans and health insurers. These findings are not summarized in the article. Refer to the fact sheet for more information.

Generally, plans worked with EBSA, their state, if applicable, and their carriers to reprocess, eliminate, or reimburse a claim or increase access, to ameliorate the violations.

USI Note. As described in the Report to Congress, if a plan receives a final determination of noncompliance with respect to the NQTL comparative analysis (after a 45-day window to cure the violations) the plan is identified on a list reported to Congress and the failure must be disclosed to members covered by the plan.

Due to this increase in guidance, EBSA expects more complete comparative analyses from the start of the investigation process. If comparative analyses are insufficient, EBSA will expect them to be cured more quickly and may not provide the same opportunities to further supplement a submission before issuing a final determination of non-compliance.⁷

PROPOSED RULES

On July 25, 2023, the Departments published a Notice of Proposed Rulemaking (“NPRM”) seeking to amend the regulations implementing MHPAEA. If finalized, these rules would impose new requirements for health plans and issuers to collect and evaluate data around the impact of an NQTL on access to MH/SUD benefits. Of particular concern to the Departments are NQTLs affecting network composition and access to MH/SUD providers. In addition, future guidance would specify the type, form, and manner of collection and evaluation of the data.

These proposed rules would be effective for the 2025 plan year. Key proposals include:

- Requiring plans to collect and evaluate certain relevant data to assess an NQTL’s impact on access to MH/SUD and medical/surgical benefits.
- Requiring plans use medical/surgical claims data to determine whether an NQTL on MH/SUD benefits is more restrictive.
- Allowing plans the ability to impose NQTLs consistent with recognized independent professional or clinical standards or standards related to fraud, waste and abuse, and in some cases reduce information required in the comparative analysis for the particular NQTL.
- Expanding content requirements in the NQTL comparative analysis to include evaluation of the outcomes from the NQTL, and for plans subject to ERISA, fiduciary certification .
- Requesting that all data be collected and evaluated by a third-party administrator or other service provider in the aggregate for all plans which utilize the same network or reimbursement rates.
- New and revised examples applying the proposed rules to a variety of NQTLs and providing an illustrative, non-exhaustive list of NQTLs.
- Delineating a process that Departments will follow to review a plan’s NQTL comparative analysis.
- Eliminating the MHPAEA opt-out for nonfederal government plans.

Specifically, for NQTLs related to network composition, the proposed rules would require health plans and issuers to collect the following data:

- Out-of-network utilization rates;

⁷ EBSA emphasized their expectation that plans and issuers have their comparative analyses prepared in advance and available upon request.

- The percentage of in-network providers actively submitting claims;
- Network adequacy metrics (including time and distance data and data on providers accepting new patients); and
- Provider reimbursement rates (including as compared to billed charges)

The NPRM also proposed the creation of a safe harbor for health plans and issuers that implement NQTLs related to network composition. Under this potential safe harbor, if the data demonstrates that the plan meets or exceeds the data standards for NQTLs related to network composition, the plan or issuer would be exempt from enforcement actions with respect to NQTLs related to network composition for a period of two years from when the comparative analysis was requested.⁸

In addition, the NPRM makes clear that for purposes of MHPAEA autism spectrum disorder and eating disorders are considered mental health conditions. Therefore, under the proposed amended definitions, if a plan provides benefits for autism or eating disorders such coverage may not be defined by the plan or issuer as a medical/surgical condition.

EMPLOYER NEXT STEPS

- Compliance with MHPAEA rules as they currently exist remains ongoing and is an enforcement priority of the Departments. These proposed rules, if finalized “as is,” would take effect for plan years beginning on or after January 1, 2025.
- Employers should continue to carefully evaluate their health plans for compliance with MHPAEA and be prepared to respond to requests by the Departments for this information. Coordination with carriers, TPAs and other service providers will be essential.
- Plan sponsors should review their plan’s current limits on MH/SUD and the plan’s written comparative analysis to determine whether changes are required in light of recent enforcement efforts.
- If a plan includes exclusions or other limitations around autism spectrum disorder or eating disorder benefits, employers should consider removing these limitations.
- Employers may wish to make plan design changes starting in 2025 if the rules are finalized as proposed, including an analysis of network adequacy.
- USI will continue to monitor this issue and will keep employers updated as applicable.

RESOURCES

- CY 2022 MHPAEA Enforcement Fact Sheet, <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/mental-health-parity/mhpaea-enforcement-2022>
- Report to Congress 2023, <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/mental-health-parity/report-to-congress-2023-mhpaea-comparative-analysis.pdf>
- Proposed Rule, <https://www.federalregister.gov/documents/2023/08/03/2023-15945/requirements-related-to-the-mental-health-parity-and-addiction-equity-act>

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⁸ The Departments were clear to indicate that satisfaction of the safe harbor does not relieve the plan or issuer from the requirement to perform comparative analyses.

This summary is intended to convey general information and is not an exhaustive analysis. This information is subject to change as guidance develops. USI does not provide legal or tax advice. For advice specific to your situation, please consult an attorney or other professional.

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