

DOL Signals Heightened Enforcement of Non-Quantitative Treatment Limitation Requirements

by Kenneth F. Ginder on May 6, 2022

Introduction. When the U.S. Department of Labor issued its biennial 2022 Mental Health Parity and Addiction Equity Act (“MHPAEA”) Report to Congress earlier this year, it outlined significant noncompliance by health plans. (Full Report [here](#).) Specifically, it found that plans were not complying with the new comparative analysis requirement for non-quantitative treatment limitations (“NQTLs”) added by the Consolidated Appropriations Act of 2021 (“CAA”). The DOL informed Congress that it intends to devote substantial resources to “proactive and rigorous enforcement,” and, by all accounts, the DOL appears intent on fulfilling that promise. This post provides plan sponsors with a high-level overview of the NQTL rules, significant issues identified by the DOL in the Report, and what sponsors can do to prepare for the on-going enforcement efforts.

Background. MHPAEA promotes equal access to treatment for mental health and substance use disorders (“MH/SUD”) by prohibiting coverage limitations that apply more restrictively to MH/SUD benefits than to medical/surgical benefits. Examples of limitations include higher copayments, separate deductibles, and stricter preauthorization or medical necessity reviews, as compared to other medical treatments covered by a plan.

New Tool. Although the MHPAEA has long prohibited limits on MH/SUD coverage that do not comply with the parity mandate, it did not explicitly prescribe how plans were to demonstrate and document that they comply with the NQTL rules. Congress addressed that issue with the CAA. The CAA amends the MHPAEA and requires plans to perform and document comparative analyses of NQTLs they impose on MH/SUD coverage in order to demonstrate parity with medical/surgical benefits. Plans must provide the analyses to the DOL upon request. The Report states that this new “enforcement authority is the cornerstone of the DOL’s heightened enforcement efforts.”

A detailed review of the information and analysis required in a comparative analysis is beyond the scope of this post, but the comparative analysis must include extensive detail. For example, it must include the evidentiary standards used to design and apply the NQTLs to MH/SUDs or medical/surgical benefits, and it must include specific findings regarding whether the plan complies with the MHPAEA.

Enforcement Efforts. The DOL quickly began using the new CAA enforcement tool. From February 10, 2021 to October 31, 2021, it issued 156 letters to plans requesting their comparative analyses for NQTLs. The DOL found widespread noncompliance. For example, many plans had no such analyses and had to request additional time to

respond. When initial responses were provided to the DOL, none were found to contain sufficient information to comply with the CAA requirements. In short, plans were unprepared.

Common Parity Violations. The Report goes on to identify common NQTL parity violations with respect to MH/SUDs. The list is instructive:

- Limitation or exclusion of applied behavior analysis (ABA) therapy or other services to treat autism spectrum disorder;
- Billing requirements – licensed MH/SUD providers can bill the plan only through specific types of other providers;
- Limitation or exclusion of medication-assisted treatment for opioid use disorder;
- Preauthorization or precertification requirements;
- Limitation or exclusion of nutritional counseling for MH/SUD conditions;
- Provider experience requirements beyond licensure;
- Care manager or specific supervision requirements for MH/SUD;
- Limitation or exclusion of residential care or partial hospitalization to treat MH/SUD conditions;
- “Effective treatment” requirements applicable only to SUD benefits;
- Treatment plan requirements;
- Employee assistance program referral requirements;
- Exclusion of care for chronic MH/SUD conditions; and
- Exclusion of speech therapy to treat MH/SUD conditions.

Conclusion. The Report makes clear that many plans are not prepared to comply with the CAA comparative analysis requirement. It also makes clear that enforcement is a priority and will remain so for the foreseeable future. Considering these developments, plan sponsors should take three steps:

- 1) Determine whether their plan imposes NQTLs, particularly the limitations identified above as most often violating the parity requirements;
- 2) If the plan imposes NQTLs, engage a qualified expert to perform and document a thorough comparative analysis of the design and application of NQTLs that demonstrates compliance with the MHPAEA; and
- 3) Once a comparative analysis has been performed, review it regularly in light of any changes to plan design or treatments to ensure the analysis remains up to date, relevant, and in compliance with the MHPAEA.

We recommend implementing these steps as soon as practicable because the DOL is focused on this issue, and it appears compliance is low. Our own informal conversations with the DOL indicate MHPAEA is a top - if not *the top* - enforcement priority for the Department’s Employee Benefits Security Administration. We also note the DOL’s continuing outreach on this topic. Last Friday, the DOL discussed it with



members of the Great Lakes Area TE/GE Council, and at the end of May it will be speaking with the Maine Employee Benefits Council. MHPAEA compliance is a priority for the DOL across the country, and plan sponsors should take notice.

Please contact a member of our Employee Benefits & Executive Compensation Group if you have any questions regarding MHPAEA compliance.



Kenneth F. Ginder

Partner

T (207) 253 4912

[email](#)