

DOL Continues Enforcement of Non-Quantitative Treatment Limitation Requirements

by Kenneth F. Ginder on August 24, 2023

Introduction: Fifteen months ago, we wrote that the U.S. Department of Labor (“DOL”) had informed Congress that it intended to devote substantial resources to enforcing the new comparative analysis requirement for non-quantitative treatment limitations (“NQTLs”) required under the Mental Health Parity and Addiction Equity Act. (Read our blog post [here](#).) Last month, the DOL issued its annual report (“Report”) to Congress on NQTL comparative analyses, and the DOL appears to be fulfilling its enforcement promise.¹ (Read the Report [here](#).)

Brief Background. Health plans and health insurance issuers (hereafter “plans”) are required to perform and document a comparative analysis of the design and application of their NQTLs to demonstrate parity between mental health or substance use disorders (“MH/SUD”) and medical/surgical benefits. In addition, the comparative analysis must be provided to the DOL, Treasury, HHS or applicable state authorities upon request.

Notable Provisions. The most recent Report to Congress, which is over 100 pages, is instructive and provides several important lessons:

MH/SUD Parity Remains an Enforcement Priority. The DOL reiterated that MH/SUD parity remains a top enforcement priority. In fact, the DOL stated that it is currently devoting “nearly 25 percent” of its Employee Benefits Security Administration enforcement program to work focused on NQTLs, and during the current reporting period it has expanded staffing, including an increase of over 30 investigators and experts.

Non-Compliant Plans Reported to Congress. Plan sponsors have typically focused their finite resources on plan premiums and cost containment strategies, rarely analyzing the plan’s MH/SUD benefits in detail and comparing them to medical/surgical benefits. While the Report offers numerous reasons for devoting more resources to complying with the NQTL comparative analysis requirement, one is unique. The Report, which is issued to Congress annually, lists the name of each plan that is determined to be non-compliant and describes the plan’s deficiencies in some detail. Plans will want to avoid being

¹ The Report was issued in conjunction with the Department of Health and Human Services (“HHS”) and the Department of the Treasury (“Treasury”).

included on this list. Importantly, non-compliance also triggers a requirement to notify participants and beneficiaries.

Opportunity to Think Carefully and Deeply. The DOL explains that the comparative analysis is an opportunity to “think carefully and deeply” about how a plan applies NQTLs to MH/SUD benefits as compared to medical/surgical benefits. The DOL expects comparative analyses to include descriptions of the ways plans have worked to avoid NQTL practices that, *by design or application*, are more stringently applied to MH/SUD benefits than to medical/surgical benefits. Unfortunately, in this second year of review, the DOL noted that it has not seen a significant improvement in the sufficiency of the initial comparative analyses received. In fact, the DOL determined that “none of the comparative analyses initially submitted were sufficient to demonstrate compliance” during this reporting period.

Comparative Analysis Requirement Is No Longer New. The DOL found that although NQTL analyses were required to be prepared by February 10, 2021, many plans are still unprepared to provide the analysis upon request, and it believes the high level of initial non-compliance is directly related to plans being unprepared. The Report highlights that the DOL has been “making extraordinary efforts to give plans . . . opportunities to supplement their responses and cure deficiencies.” However, it also notes that those efforts are time- and resource-intensive. The Report also notes that “[m]ore than 2 years have elapsed” since the requirement took effect, and the requirements “are no longer new.” It is fair to assume that the DOL’s accommodative position and patience will not last indefinitely. Plan sponsors should ensure the comparative analysis has been completed and is up to date.

Top Areas of DOL Focus: The Report identified the different types of NQTLs the DOL requested information on during the reporting period and noted that the DOL is intentionally focusing on key areas. The five most common types of NQTLs that the DOL requested information on are:

- prior authorization, precertification, or prior notification;
- exclusion of applied behavior analysis (“ABA”), intensive behavioral, rehabilitative/habilitative, or cognitive therapy to treat MH/SUD conditions;
- network admission standards, including reimbursement rates and network adequacy;
- concurrent care review; and
- out-of-network reimbursement rates and out-of-network provider treatments.

Plans should focus on these areas when performing their comparative analyses.

More Exclusions Than Expected, But Also Some Successes. The DOL found more exclusions of key treatments than it expected (e.g., nutritional counselling for eating

disorders); however, enforcement initiatives have produced success stories. For example, a service provider made a widespread correction to remove an exclusion for ABA therapy treatment of autism spectrum disorder, affecting approximately 1,000 plans covering over 1 million participants.

Conclusion. The Report is instructive for many reasons. It makes clear that NQTL parity remains a top enforcement priority of the DOL, and that plans continue to struggle with compliance. It also reminds plan sponsors that non-compliant plans are reported to Congress. While the DOL has been accommodative since the requirement became effective in early 2021, plans should not assume that posture will continue indefinitely. Accordingly, plans should devote sufficient resources to complying with this area of the law. That attention will result in better benefits for participants, facilitate legal compliance, and reduce the risk of being reported to Congress.

Please contact a member of our [Employee Benefits & Executive Compensation Group](#) if you have any questions regarding NQTL parity requirements.



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