Proposed Mental Health Parity Rule Includes Costly Network Adequacy Requirements

Employers Must Certify Compliance for Every NQTL Analysis

Background:

The Mental Health Parity and Addiction Equity Act (MHPAEA) requires employer health plans that cover mental health and substance use disorder (MH/SUD) benefits to provide such coverage on par with medical/surgical benefits. Specifically, employer plans as written and operated cannot impose financial requirements (*e.g.*, deductibles, copays), quantitative treatment limitations (*e.g.*, number of covered days, visits, or treatments), or non-quantitative treatment limitations ("NQTLs", *e.g.*, prior authorization requirements, reimbursement rates) on MH/SUD benefits that are more restrictive than those applied to medical/surgical benefits.

Congress amended the MHPAEA in 2020 to require employers to perform and document a complex comparative analysis of the design and application of their NQTLs and provide those analyses to the U.S. Labor Department (DOL) upon request. However, there has been considerable confusion about what these NQTL comparative analyses should contain and about the parity obligations more generally.

In practice, employers often rely on third-party administrators (TPAs) and other service providers to provide them with the NQTL comparative analyses that are required by MHPAEA. However, plan sponsors are generally responsible for ensuring compliance and could, in certain circumstances, be liable for penalties for any violations. To the extent service providers are co-fiduciaries with employer plans, they are subject to the provisions governing fiduciary conduct and liability.

Proposed Rule:

On August 3, 2023, DOL published a proposed rule that would substantially increase employer parity obligations and health care costs. When finalized, the proposed rules would be effective beginning with 2025 plan years. The HR Policy Association expects the final rule to be substantially similar to the proposed rule. The proposed rule:

- Clarifies that MHPAEA requires employers to ensure plan participants can *access* their MH/SUD benefits in parity with their medical/surgical benefits;
- Requires one or more named plan fiduciaries to review a written list of all NQTLs, a general description of the documentation relied on in preparing the comparative analysis, the findings and conclusions of *each* NQTL analysis, *and then certify whether they found the comparative analysis to comply with the content requirements of the regulations*.

- Requires employer plans to collect, evaluate, and consider the impact of various outcome data (*e.g.*, claim denial rates) and take "reasonable action" to address "material differences" in accessing MH/SUD benefits compared to medical/surgical benefits – such action must also be documented in the employer's NQTL comparative analysis (Note: material difference is not defined in the proposal).
- Increases the standards related to network composition and network adequacy metrics, provider reimbursement rates, and prior authorization as part of new guidance on the content requirements of the NQTL comparative analyses.
- Requires employer plans to collect and evaluate specific data points related to network composition, such as the number and percentage of relevant claims denials, in-network and out-of-network utilization rates, 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).
- Requires employer plans to provide meaningful MH/SUD benefits (see below).

Key Takeaways for Employers:

Expect higher costs for plan administration, indemnification and legal review, and higher provider reimbursement rates for MH/SUD claims. DOL expects premiums to increase, out-of-pocket costs to be lower, increased costs from expanded coverage and utilization of MH/SUD benefits, and changes in provider utilization patterns. Timely access to in-network MH/SUD providers is expected to marginally improve, but given the shortage of providers it is unclear how much.

Review plan documents for potential problems. The proposed rule provides new examples of some common plan designs that DOL has found to be a problem, particularly regarding autism spectrum disorder benefits and eating disorder benefits. Employers should review their plan documents to ensure they do not raise a red flag given the new guidance. If an impermissible limitation or restriction is identified, employers should amend their plan documents to remove them, and any third-party administrator (TPA) or administrative service organization (ASO) should be notified of any changes that need to be made to plan operations.

Review plan benefits to ensure it provides "meaningful benefits." Under the proposed rule, if a plan provides treatment for a specific condition in one benefit classification (*e.g.*, inpatient/in-network, inpatient/out-of-network, outpatient/in-network, outpatient/out-of-network, prescription drugs, and emergency care), it must provide for treatment in all six benefit classifications. For example, if a plan covers treatment for autism (*e.g.*, ABA therapy) on an outpatient /in-network basis, the plan must also provide the autism benefit in the other five benefit classifications.

Consider achieving parity by imposing new restrictions on medical/surgical coverage, rather than by reducing limitations on MH/SUD benefits. The proposed rule will significantly reduce the ability of employer plans to apply certain medical management technics (*e.g.*, prior authorization) to MH/SUD benefits.

Review TPA and ASO contracts. Self-insured employers should review their TPA and ASO contracts to ensure they have contractually delegated responsibility to the TPA/ASO for compliance with MHPAEA requirements, with appropriate indemnification for noncompliance. Employer plans should have clear protocols and processes in place to ensure the TPA/ASOs for both medical/surgical and MH/SUD benefits provide all of the information necessary for MHPAEA compliance.

- The proposed rule includes 13 new examples of NQTLs that are helpful for identifying potential problems and should be reviewed along with the MHPAEA Self-Compliance Tool. If a problem is identified, it should be reviewed with legal counsel to see if it needs to be resolved.

Consider giving TPA/ASOs ERISA fiduciary status. Employers may want to consider specifying in contracts with a TPA and/or service provider that those parties are a named fiduciary with respect to MHPAEA compliance.

Confirm all NQTL comparative analyses have been performed and request a copy. An employer's obligation to perform and document a NQTL comparative analysis is not dependent upon a DOL audit request, and employers have just ten business days to provide their comparative analyses to DOL. Moreover, going forward, DOL expects "more complete comparative analyses from the start of the review process" and will expect any deficiency "to be cured more quickly." In the future, DOL may not provide opportunities to employers to address problems before issuing a final determination of non-compliance.

- **New employer certification requirement.** Under the proposed rule, beginning 2025, employer NQTL comparative analyses must also include a certification by one or more named fiduciaries who have reviewed the analysis, stating they found it to be in compliance with the proposed rule's content requirements.

Start asking questions about your plan's network composition well before 2025. Issues around network composition include reviewing a wide variety of network adequacy metrics including time and distance data, and data on providers accepting new patients, the number and percentage of relevant claims denials, in-network and out-of-network utilization rates, and provider reimbursement rates as compared to billed charges.

- Notably, DOL recognizes there are significant challenges to building parity compliant MH/SUD networks because of the shortage of providers in some geographic locations. If an employer plan is otherwise compliant with their parity obligations and the employer has taken comprehensive action to address network access issues, DOL will not find the employer out of compliance if plan participants have to rely on out-of-network providers due to provider shortages.

Potential enforcement safe harbor for employers? A separate Technical Release from DOL requests comments regarding future rulemaking on the data requirements related to network composition. DOL also seeks comment on a potential enforcement safe harbor for employers and

what data in their comparative analyses would demonstrate they meet or exceed all the standards with respect to NQTLs related to network composition.

CHRO Actions:

The proposed rule clearly signals DOL's parity enforcement focus going forward will be on ensuring parity regarding *access* to MH/SUD benefits and this will be a difficult standard for TPA/ASOs to meet.

- **Get all of your NTQL analyses from your TPA/ASOs.** Your benefits and legal teams should review for compliance and insist on changes if any need to be made. Consider outside counsel if you need it.
- **Be prepared to respond to any DOL audit letter.** What's your plan? Who will be involved? Will you engage outside counsel?
- **Consider submitting comments on the proposed rule.** The HR Policy Association will be submitting comments on the proposed rule, which are due October 2, 2023. Please reach out to Mark Wilson (mwilson@hrpolicy.org) and Margaret Faso (mfaso@hrpolicy.org), if you have any questions or if your team would like us to make any comments on your behalf. You can also submit your own comments electronically, which can be done at https://www.regulations.gov. Follow the "submit a comment" instructions, and refer to file code "1210-AC11."
- **Be prepared to modify your TPA/ASO contracts when the final rule is published.** We expect the final rule will be published before July 2024, and for it to be effective beginning January 1, 2025.