Report to Congress Highlights Health Plan Violations of Mental Health Parity Law

February 2022

In January 2022, the Departments of Labor, Treasury, and Health and Human Services (the Departments) submitted a report to Congress (*2022 MHPAEA Report to Congress*) on their activities related to the Mental Health Parity and Addiction Equity Act (MHPAEA). The report focused on the Departments' MHPAEA enforcement activities and included details regarding group health plan violations of MHPAEA.

This Aon bulletin discusses:

- Background
- The Department of Labor's Findings on NQTLs and Violations
- Analysis
- What Employers Should Do

Background

Under MHPAEA group health plans that provide mental health and substance use disorder (MH/SUD) benefits are required to design and administer those benefits in parity with medical/surgical benefits under the plan. Specifically, group health plans must apply financial and quantitative treatment limits (such as copayment, coinsurance, visit limits, etc.), as well as nonquantitative treatment limits (NQTLs) (such as pre-authorization requirements, provider reimbursement rates, network admission criteria, etc.) to both medical/surgical benefits and MH/SUD in a manner that complies with the requirements of MHPAEA.

Additionally, under MHAPEA as amended by the Consolidated Appropriations Act, group health plans are required to conduct a comparative analysis of their NQTLs as applied to both medical/surgical benefits and MH/SUD benefits in design and administration to demonstrate compliance with MHPAEA. Those analyses must include certain detailed information and be provided to the Departments upon request. The Departments began requesting this information from plans starting in February 2021. The report to Congress focused primarily on these NQTL requirements and the Departments' findings.

The Department of Labor's Findings on NQTLs and Violations

Sufficiency of Reports Submitted to the DOL

From February 10, 2021, through October 31, 2021, the Department of Labor (DOL) issued 156 letters to plans and issuers requesting the comparative analysis. As a result, the DOL found that plans were not prepared to comply its requests for a comparative analysis, and initially none of the comparative analyses reviewed by the DOL included sufficient information that met the DOL's requirements. After a

final review, the DOL issued 30 initial determination letters finding that 48 NQTLs applied to MH/SUD benefits violated MHPAEA.

Noncompliant Plan Provisions

The report also highlighted specific plan provisions as designed or in operation that were noncompliant with the NQTL requirements under MHPAEA. These provisions included the following:

- Limiting or excluding Applied Behavior Analysis therapy or other services to treat Autism Spectrum Disorder (ASD);
- Requiring MH/SUD providers to bill the plan only through certain other providers;
- Limiting or excluding medication assisted treatment for opioid use disorder;
- Requiring preauthorization or precertification for MH/SUD benefits, but not for medical/surgical benefits (both as a specific requirement and in the administration of the benefits);
- Limiting or excluding nutritional counseling for MH/SUD conditions, but covering nutritional counseling for medical/surgical conditions;
- Requiring additional qualifications for MH/SUD providers in order to join the network;
- Requiring care manager or specific supervision requirements for MH/SUD benefits;
- Excluding or limiting residential care or partial hospitalization to treat MH/SUD conditions;
- Applying an “effective treatment” requirement to SUD benefits, but not to other medical/surgical benefits;
- Requiring a treatment plan for MH/SUD benefits;
- Requiring a referral from an employee assistance program before MH/SUD benefits are covered;
- Excluding care for chronic MH/SUD conditions;
- Excluding speech therapy to treat MH/SUD conditions (such as ASD);
- Requiring concurrent care and discharge planning requirements for MH/SUD benefits;
- Requiring retrospective review for MH/SUD benefits;
- Applying age, scope, or durational limits applicable to MH/SUD benefits; and
- Covering telehealth services for medical/surgical services but not MH/SUD services.

The Centers for Medicare & Medicaid Services (CMS) also presented similar findings to Congress related to NQTL requirements. CMS has direct enforcement authority for non-federal governmental plans that are subject to MHPAEA.

Analysis

Given the report's findings that none of the comparative analyses initially satisfied the DOL's requirements, more detailed guidance (including examples) from the Departments might result in better compliance.

Additionally, plans and plan sponsors may find it difficult to comply with the NQTL requirements under MHPAEA, with all good intentions. This is because plans and plans sponsors generally have little input into how their third-party administrators (TPAs) or carriers actually apply NQTLs in the day-to-day operation of the plan. While plans may have more input into the benefits covered and the overall design, they have less control over the actual administration of those benefits. For example, plans would have little input into provisions such as:

- How preauthorization requirements are applied for MH/SUD benefits as compared to medical/surgical benefits;
- How MH/SUD providers are reimbursed; and
- The criteria for admitting MH/SUD providers into the network.

This means that plans and plan sponsors are dependent on their administrators and carriers to get it right, but the plans are directly subject to any enforcement activity by the Departments.

The emerging debate in Congress over increased penalties for violations of MHPAEA highlights the complexities and risks for plan sponsors. However, the DOL also has recommended that Congress amend ERISA to provide the DOL with the authority to pursue MHPAEA violations directly against TPAs/carriers that provide administrative services to plans. Undertaking enforcement activity directly against TPAs/carriers would provide the DOL with an efficient means of ensuring compliance for the millions of plans administered by those TPAs/carriers, while recognizing the reality that plan sponsors often have little control over the day-to-day administration and compliance with MHPAEA. This may provide some protection for plan sponsors, given the DOL's other recommendation to Congress to allow civil monetary penalties for violations of MHPAEA.

What Employers Should Do

In light of the report's findings and absent any immediate Congressional action, plan sponsors should do the following:

- Review plan designs and accompanying documentation (like summary plan documents) to see if any of the specific plan provisions the DOL identified as problematic (see above) are included in the plan and decide how to modify or amend those provisions for compliance.
- Discuss with TPAs/carriers how any of the problematic NQTLs discussed above are administered in practice.
- Ask TPAs/carriers if they have conducted a comparative analysis with respect to the plan's design and operation and whether they will provide that comparative analysis to the plan sponsor. That

analysis should be specific to the plan at issue. If the plan has adopted the TPA/carrier's standard design and administration, the TPA/carrier will likely have a specific comparative analysis for the plan.

- If the plan sponsor receives or has already received a comparative analysis from the TPA/carrier, the plan sponsor should ensure that the analysis complies with the guidance and information provided by the Departments and includes the following items:
    - Specific evidence or detailed information to support any conclusions as to how the NQTL applies to both medical/surgical benefits and MH/SUD benefits;
    - Meaningful and specific comparisons and/or analyses as to the factors or standards that apply to medical/surgical benefits and MH/SUD benefits; for example, it is not sufficient to simply provide two columns, one for medical/surgical benefits and one for MH/SUD benefits, stating the same text for each with a conclusion that they are the same;
    - Identification of the specific medical/surgical benefits and MH/SUD benefits affected by the NQTL;
    - Definitions of precise terms that may be relevant in applying an NQTL. For example, a factor such as "cost-containment" or "high-cost services" may be relevant in determining what benefits are subject to pre-authorization, but those terms should be precisely defined, and the plan should explain how it came up with those terms or standards; and
    - How a specific NQTL applies in the actual operation of the plan, including how stringently it applies with respect to medical/surgical benefits as compared to MH/SUD benefits.
- If a plan sponsor has not or will not receive a compliant NQTL comparative analysis from its TPA/carrier for its specific plan, it will need to prepare its own NQTL comparative analysis for the plan.
- Ensure that contracts and administrative services-only agreements with TPAs/carriers include specific language regarding how the TPA/carrier will comply with MHPAEA on the plan's behalf and detail what the TPA/carrier's role will be in documenting and preparing the NQTL comparative analysis on behalf of the plan. The contract or agreement should include the frequency of updating the comparative analysis and the role of the TPA/carrier in assisting the plan with responding to requests by the DOL.

Resources

The DOL news release is available here.

The *2022 MHPAEA Report to Congress* is available here.

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