

Tri-Agencies Issue a Wave of Guidance Focusing on Compliance with Mental Health Parity Requirements

EXECUTIVE SUMMARY

On July 25, 2023, the Departments of Treasury, Labor, and Health and Human Services (collectively, the “Departments”) issued [proposed regulations](#) that provide guidance regarding compliance with the non-quantitative treatment limitations analysis that is required of group health plans under the Mental Health Parity and Addiction Equity Act (“MHPAEA”). At the same time, the Departments simultaneously issued a [Technical Release](#) soliciting comments from the public and describing a potential enforcement safe harbor; an [Enforcement Fact Sheet](#) outlining the Department of Labor’s (“DOL”) MHPAEA enforcement activities; and the DOL’s [annual MHPAEA Comparative Analysis Report to Congress \(the “2023 Report”\)](#).

In the world of mental health parity compliance, where the goalposts set by the Departments seem to constantly move, this wave of guidance serves as a guide (and warning shot) to employers about their compliance obligations and how the government is expected to direct its enforcement efforts.

Proposed Regulations and Technical Release

NQTL Comparative Analysis. The Proposed Regulations provide guidance on some of the specific data the Departments expect group health plans to consider in determining whether their non-quantitative treatment limitations (“NQTLs”)¹ comply with the MHPAEA. While MHPAEA has always required that NQTLs for mental health and substance use disorder benefits be no more stringent than the NQTLs that apply to medical and surgical benefits, the Consolidated Appropriations Act, 2021 (“CAA”) added a requirement that group health plans have written documentation demonstrating this parity.

The Proposed Regulations specify the content the Departments expect to see in NQTL comparative analyses. At a minimum, a NQTL comparative analysis must provide: (1) a description of the NQTL; (2) the identification and definition of the factors used to design or apply the NQTL; (3) a description of how factors are used in the design or application of the NQTL; (4) a demonstration of comparability and stringency, as written and in operation; and (5) findings and conclusions. Each group health plan is required to provide the Departments or applicable state authorities, upon request, a written list of all NQTLs the group health plan imposes and a general description of any information considered or relied upon in preparing each NQTL’s comparative analysis.

¹ An NQTL is any non-numerical limitation on a covered service under a health plan, such as a step-therapy requirement or a prescription drug formulary design.

Although these Proposed Regulations are not yet finalized, they signal the Departments' expectation that group health plan sponsors should have already completed their comparative analyses and should be prepared to provide them **within ten business days**, when requested by the government. The Proposed Regulations also state that all group health plan participants and beneficiaries can request a copy of the comparative analysis free of charge. If the plan administrator fails to provide the requested analysis within 30 days, it could be subject to penalties of up to \$110 per day.

Potential Safe Harbor Related to Network Composition. The Technical Release solicits comments on a potential enforcement safe harbor that the Departments intend to provide for any NQTL related to network composition that, if satisfied, would provide sufficient evidence to demonstrate that plan coverage provides participants with comparable access to in-network mental health/substance use disorder and medical/surgical providers. Under this safe harbor, the Departments would not take enforcement action for a two-year period against a group health plan that met or exceeded specific—**but as-yet-undeveloped**—data-based standards related to network composition. The safe harbor could include a variety of metrics, such as in-network and out-of-network utilization rates (including provider claim submissions), reimbursement rates (as compared to billed charges), and network adequacy metrics (including time and distance data, and data on providers accepting new patients). The Departments must receive comments no later than October 2, 2023.

The 2023 Report

In addition to the Proposed Regulations, the Departments released the 2023 Report, the second annual MHPAEA compliance report since the enactment of the CAA. The annual reports are intended to inform Congress about group health plans' compliance efforts, and the Departments' enforcement priorities, with the MHPAEA.

The 2023 Report's findings on group health plans' NQTL comparative analysis compliance efforts are gloomy. As in the initial annual report, the 2023 Report notes that not one NQTL comparative analysis was sufficiently detailed so as to demonstrate compliance with the MHPAEA. Although the Departments report that group health plans are generally cooperative in the investigation process, the DOL in particular finds itself regularly engaging in follow-up questions and information requests, which requires the DOL to expend a lot of resources on each analysis.

In addition to the four specific areas for NQTL enforcement priority identified in the initial report to Congress [(1) prior authorization requirements; (2) concurrent care review requirements; (3) standards for provider admission to networks; and (4) out-of-network reimbursement rates], the 2023 Report identifies two more areas of enforcement priority: (5) impermissible exclusions of key treatments for mental health/substance use disorder conditions; and (6) adequacy standards for mental health/substance use disorder provider networks.

Knowing that the Departments will be focusing on these six areas for enforcement, and that the DOL has generally been unhappy with the quality of NQTL comparative analyses, can help group health plan sponsors and administrators direct their MHPAEA compliance efforts. As group health plans work through the task of preparing, reviewing, and updating their NQTL analyses, group health plan administrators should ensure that the six areas of enforcement priority are addressed in their written NQTL analysis. In addition, group health plan administrators should ensure that their written analysis provides an in-depth scrutiny of each NQTL, with supporting documentation and data. Taking these steps now may help to quickly and efficiently close any DOL inquiry. This is especially important now that the reports to Congress have started "naming and shaming" -- identifying **by name** the group health plans that are out of compliance. Going forward, the annual MHPAEA compliance reports will include the group health plan name and

employer identification number of any group health plan to which the DOL has provided a final determination of non-compliance.

Action Steps for Employers

- ✓ Employers and plan administrators of group health plans should review their services agreements with their insurance carriers or third-party administrators to ensure that they will provide the necessary data, information, and MHPAEA analyses.
- ✓ Group health plans that have not prepared a written comparative analysis of NQTLs should contact their insurance issuers or third-party administrators to begin the process as soon as possible.
- ✓ If a group health plan has experienced significant changes in coverage or demographics since the last NQTL comparative analysis was completed, the plan administrator should consider updating the analysis.
- ✓ Plan administrators should review their completed written comparative analyses to make sure it addresses the six areas of enforcement priority.
- ✓ Appropriate indemnification terms and similar contractual protections should be negotiated to protect the employer in the event that a group health plan's design or administration does not satisfy MHPAEA requirements, or in the event that any NQTL analyses provided are determined to be deficient.

Additional Information

For additional information about MHPAEA compliance, or any other employee benefits matter, please contact any member of our Employee Benefits and Executive Compensation Group listed below.

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