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Nineteenth Set of FAQs on the ACA Issued

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As previously reported, the Consolidated Appropriations Act, 2021 ("CAA") amends the Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA") to require group health plans and health insurers to conduct a comparative analysis of non-quantitative treatment limitations ("NQTLs") imposed on mental health/substance use disorder ("MH/SUD") benefits as compared to medical and surgical benefits. NQTLs are limits on the scope or duration of treatment that are not expressed numerically.

On April 2, 2021, the Departments of Labor, the Treasury and Health and Human Services (collectively, "the Departments") issued FAQ 45, providing the first guidance on this new requirement.

Briefly, the FAQ:

- Clarifies that plans and carriers should now be prepared to make a comparative analysis available upon request.
- Includes a list of elements that should be included in a comparative analysis to meet the Department's requirements and describes the types of documents that plans should be prepared to make available in support of the analysis.
- Describes circumstances where a comparative analysis will not be sufficient, including when it:
  - consists of conclusory or generalized statements without specific supporting evidence and detailed explanations; or
  - is a mere production of a large volume of documents without a clear explanation of how and why each document is relevant.
- Outlines the correction and enforcement action the Departments may take in the event the plan has not provided sufficient information to review the comparative analysis or where the Departments determine the plan is not in compliance with MHPAEA.

- Allows participants, beneficiaries and their authorized representatives in an ERISA-covered plan to receive a copy of the comparative analysis upon request.

- Highlights that near-term enforcement efforts will be focused on the following NQTLs:
  - Prior authorization requirements for inpatient services;
  - Concurrent review for inpatient and outpatient services;
  - Standards for provider admission to participate in-network, including reimbursement rates; and
  - Out-of-network reimbursement rates (plan methods for determining usual, customary and reasonable ("UCR") charges.

Below you will find additional details on the guidance.

Background

Mental Health Parity and Addition Act of 2008

The Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA") applies to:

- employers with at least 51 employees offering a group health plans that provides for any MH/SUD benefits, and

- fully insured group health plans in the small market, generally employers with 50 or fewer employees (small market in California and New York are employers with fewer than 100 employees) , that are required to provide all essential health benefits, including MH/SUD benefits.

The MHPAEA:

- Provides that financial requirements (such as coinsurance and copays) and treatment limitations (such as visit limits) imposed on MH/SUD benefits cannot be more restrictive than the predominant financial requirements and treatment limitations that apply to substantially all medical/surgical benefits in a classification.

- Prohibits separate treatment limitations that apply only to MH/SUD benefits.

- Provides that NQTLs may not be imposed on MH/SUD benefits in any classification unless, the processes, strategies, evidentiary standards, and other factors are comparable and applied no more stringently for MH/SUD benefits than for medical/surgical benefits under the terms of the plan (or health insurance coverage) as written and in operation.

- Imposes certain disclosure requirements.

With respect to NQTLs, the focus is not on whether the final result is the same for MH/SUD benefits as for medical/surgical benefits, but rather on whether the underlying processes, strategies, evidentiary standards, and other factors are in parity.

The Consolidated Appropriations Act, 2021

The CAA amends MHPAEA to expressly require a group health plan that imposes NQTLs on MH/SUD benefits to perform and document a comparative analysis of the design and application of NQTLs. Beginning February 10, 2021, plans (and health insurance carriers) must make a comparative analysis available to the Departments or applicable state authorities upon request.

What's New?

When must the NQTL comparative analysis be available?

As the requirement applies beginning February 10, 2021, plan and issuers should now be prepared to make their comparative analysis available upon request.

Note the CAA expressly requires that plans and carriers conduct and document the comparative analysis of the design and application of NQTLs. It is no longer a best practice. The carrier is responsible for compliance for fully insured plans subject to the MHPAEA. For self-funded plans subject to MHPAEA, the employer is ultimately responsible for compliance. Employers should coordinate with third-party administrators ("TPAs") or other vendors to assist in performing this analysis.

What documentation must be made available?

The FAQ provides additional clarification, including minimum requirements for a comparative analysis to be sufficient under the law. The analysis must contain a detailed, written, and reasoned explanation of the specific plan terms and practices at issue and include the bases for the plan's or carrier's conclusion that the NQTLs comply with MHPAEA. The report developed by the plan must include comparative analysis specific to each NQTL imposed on a MH/SUD benefit.

At a minimum, sufficient analyses must include a robust discussion of all of the elements listed below.

1. A clear description of the specific NQTL, plan terms, and policies at issue.

2. Identification of the specific MH/SUD and medical/surgical benefits to which the NQTL applies within each benefit classification, and a clear statement as to which benefits identified are treated as MH/SUD and which are treated as medical/surgical.

3. Identification of any factors, evidentiary standards or sources, or strategies or processes considered in the design or application of the NQTL and in determining which benefits are subject to the NQTL. Analyses should explain whether any factors were given more weight than others and the reason(s) for doing so, including an evaluation of any specific data used in the determination.

4. To the extent the plan or issuer defines any of the factors, evidentiary standards, strategies, or processes in a quantitative manner, it must include the precise definitions used and any supporting sources.

5. The analyses, as documented, should explain whether there is any variation in the application of a guideline or standard used by the plan or issuer between MH/SUD and medical/surgical benefits and, if so, describe the process and factors used for establishing that variation.

6. If the application of the NQTL turns on specific decisions in administration of the benefits, the plan or issuer should identify the nature of the decisions, the decision maker(s), the timing of the decisions, and the qualifications of the decision maker(s).

7. If the plan's analyses rely upon any experts, the analyses, as documented, should include an assessment of each expert's qualifications and the extent to which the plan or issuer ultimately relied upon each expert's evaluations in setting recommendations regarding both MH/SUD and medical/surgical benefits.

8. A reasoned discussion of the plan's conclusions as to the comparability of the processes, strategies, and factors, within each affected classification, and their relative restrictiveness, both as applied and as written. This discussion should include citations to any specific evidence considered and any results of analyses indicating that the plan or coverage is or is not in compliance with MHPAEA.

9. The date of the analyses and the name, title, and position of the person or persons who performed or participated in the comparative analyses.

A general statement of compliance, coupled with a conclusory reference to broadly stated processes, strategies, evidentiary standards, or other factors will not be sufficient to meet this statutory requirement.

The guidance suggests that plans should utilize the DOL's own self-compliance tool to determine their compliance with MHPAEA. The tool can be accessed at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/self-compliance-tool.pdf.

Plans should be prepared to make available all documents that support the analysis and conclusions of their comparative analysis. The FAQ and the DOL's self-compliance tool include a list of the types of documents that should be available to support a NQTL analysis.

Examples of insufficient documentation

The guidance provides examples of practices and procedures plans should avoid in responding to a request for comparative analysis as they are insufficient, including:

- Production of a large volume of documents without a clear explanation of how and why each document is relevant to the comparative analysis.

- Conclusory or generalized statements, including mere recitations of the legal standard, without specific supporting evidence and detailed explanation.

- Identification of factors, evidentiary standards, and strategies without a clear explanation of how they were defined and applied in practice.

- An analysis that is outdated due to time, change in plan structure or other reason.

Requests from state regulating agencies and participants and beneficiaries

In addition to the Departments, state regulators, participants, beneficiaries and/or enrollees (or their authorized beneficiary) can also request a NQTL analysis. As with other requests, plans must be prepared to make this information available upon request. The guidance also makes clear that any NQTL analysis must also be provided, free of charge, upon request as part of an adverse determination appeal under a non-grandfathered group health plan.

Near-term enforcement priorities

The Departments will focus their enforcement efforts on any NQTL that is brought to their attention through a complaint or violation. In the absence of such a complaint, the Departments will focus their enforcement efforts on the following NQTLs:

- Prior authorization requirements for in-network and out-of-network inpatient services;

- Concurrent review for in-network and out-of-network inpatient and outpatient services;

- Standards for provider admission to participate in a network, including reimbursement rates; and

- Out-of-network reimbursement rates (plan methods for determining usual, customary, and reasonable charges).

If a request for a comparative analysis references a specific NQTL, plans should also be prepared to make available a list of all other NQTLs that they have performed a comparative analysis on. It is possible that plans may be required to submit analyses for these additional NQTLs.

Penalties

If the Departments conclude, after review of the analyses, that the plan has provided insufficient information, the Departments can specify the information necessary for the plan to comply with the request. If the Departments conclude that the plan is not in compliance with MHPAEA, the plan will be required to specify what actions they will take to bring the plan into compliance. The Act imposes a 45-day corrective action period where the plan will be required to submit new analyses showing that they have now come into compliance with MHPAEA. If the plan is still noncompliant after the corrective action period, the plan, within 7 days of receipt of the Departments' determination of noncompliance, must notify all individuals enrolled in the plan or coverage that the coverage has been determined to be out of compliance with MHPAEA.

Employer Action

Carriers of fully insured plans should be responsible for compliance with this new requirement. Self-funded plans should coordinate with their third-party administrators or carrier partners to determine if they are able to conduct the analysis for the plan. Plans should be prepared to apply pressure on their TPAs or carrier partners if they initially refuse to conduct the analyses. The carriers and TPAs are in the best position to complete these NQTL analyses. However, if after repeated requests these vendors are still unwilling to provides the analyses, plans must be prepared to complete the analyses themselves.