

Publications

Labor and Employment Alert: Mental Health Parity: Get Ready to Prove It

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On April 23, 2018, the Department of Labor (DOL) published a second draft of a model form, the [Disclosure Template](#), that a group health plan participant (or his or her representative) may use to request documentation of compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA). If an employer receives this type of request, it has just 30 days to respond. If an employer doesn't respond in 30 days, penalties of up to \$110 per day may apply. The DOL also published a [Self-Compliance Tool](#) that employers can use to see whether they are prepared for DOL inquiries and/or participant demands.

Background

Mental health parity is measured for each of three types of requirements (financial requirements, quantitative treatment limitations, and non-quantitative treatment limitations) in each of eight classifications and sub-classifications (network office visits, out-of-network office visits, other network outpatient services, other out-of-network outpatient services, network inpatient services, out-of-network inpatient services, emergency care, and prescription drugs). In each case, the requirements applicable to mental health and substance use disorder benefits must be comparable to (or less restrictive than) the requirements applicable to medical and surgical benefits.

Comparability with respect to financial requirements and quantitative treatment limitations is a function of plan design and most plans are designed to comply. Most of the difficulty for employers has been with respect to non-quantitative treatment limitations (NQTs) which require a more subjective determination to determine comparability. According to the DOL's [2017 MHPAEA Enforcement Fact Sheet](#), almost half of the mental health parity violations cited by the DOL related to NQTs.

What is a non-quantitative treatment limitation (NQTL)?

Section F of the Self-Compliance Tool provides the following examples of NQTLs:

- Standards for medical necessity.
- Standards for determining whether a treatment is experimental or investigative.
- Prior authorization and ongoing authorization requirements.
- Concurrent review standards.
- Formulary design for prescription drugs.
- Standards for provider admission to participate in a network, including reimbursement rates.
- Method of determining the allowed amount of out-of-network charges.
- Fail-first and step therapy policies.
- Exclusions of specific treatments for certain conditions.
- Restrictions on applicable provider billing codes.
- Standards for providing access to out-of-network providers.
- Exclusions based on failure to complete a course of treatment.
- Restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits for services provided under the plan or coverage.

Virtually every medical plan applies some forms of NQTLs to mental health and substance use disorder benefits with the goal of covering treatment that is both clinically effective and cost effective.

The application of NQTLs is typically managed by a claims administrator and/or pharmacy benefit manager (PBM) without involving the employer. However, under ERISA, the employer remains responsible for assuring that the claims administrator and/or PBM applies NQTLs to mental health and substance use disorder benefits in parity with the application of NQTLs to medical/surgical benefits. So what is an employer to do?

Have a conversation with your claims administrator and PBM

Use the Self-Compliance Tool as the basis for a conversation with your claims administrator and PBM. You will want to ask:

Does the claims administrator or PBM have written policies explaining the application of each type of NQTL to both mental health and substance use disorder benefits and medical/surgical benefits?

Application of the NQTL to both mental health and substance use disorder benefits and medical/surgical benefits needs to be considered in order to determine parity.

You will want your claims administrator and PBM to have documentation of the *reasons* for applying NQTLs to both mental health and substance use disorder benefits and the *sources* they used in developing the NQTLs. The claims administrator and PBM should be able to identify the decision makers implementing the NQTLs and whether the decision makers have comparable expertise with

both mental health and substance use disorder and medical/surgical benefit claims.

Examples of reasons for applying a NQTL to a benefit

- Excessive utilization.
- Recent medical cost escalation.
- Provider discretion in determining diagnosis.
- Lack of clinical efficiency of treatment or service.
- High variability in cost per episode of care.
- High levels of variation in length of stay.
- Lack of adherence to quality standards.
- Claim types with high percentage of fraud.
- Current and projected demand for services.

Examples of sources used in developing a NQTL

- Internal claims analysis.
- Medical expert reviews.
- National accreditation standards.
- Internal market and competitive analysis.
- Medicare physician fee schedules.
- Evidentiary standards, including any published standards as well as internal plan or issuer standards, relied upon to define the factors triggering the application of an NQTL to benefits.

The claims administrator and PBM need to be able to show that the reasons for applying a NQTL and the sources for developing a NQTL were applied comparably to mental health/substance use disorder benefits and medical/surgical benefits.

Are the claims administrator and PBM prepared to hand over the written policies in response to a request from a participant or the DOL?

The answer needs to be yes. As noted in Section G of the Self-Compliance Tool, “Plans...cannot refuse to disclose information necessary for the parity analysis on the basis that the information is proprietary.” All the same, you may want to work through any concerns the claims administrator or PBM might have before you receive a request. Remember that if you get a request for the policies, you have just 30 days to respond.

Inaction may be risky. The DOL plans continued focus on enforcement of mental health parity requirements. In addition, numerous class action lawsuits alleging mental health parity violations are pending. Please let us know if you have questions or if we can help you prepare.