

Publications

The Good, the Bad and the Ugly: the Department of Labor Releases its 2023 MHPAEA Report to Congress

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The Mental Health Parity and Addiction Equity Act (MHPAEA) prohibits group health plans from placing limits on mental health and substance abuse disorder (MH/SUD) benefits that are more restrictive than limits placed on medical or surgical benefits (M/S). As reported previously in a Vorys client alert ([available here](#)) the Consolidated Appropriations Act, 2021 (CAA 2021) amended the Employee Retirement Income Security Act of 1974, as amended (ERISA) to require that group health plans perform and document comparative analyses of the design and application of non-quantitative treatment limitations (NQTLS).” NQTLS are generally non-numerical requirements that limit the scope or duration of benefits, such as prior authorization requirements, step therapy requirements, and standards for provider admission to participate in a network, including methodologies for determining reimbursement rates. CAA 2021 also requires the Department of Labor, the Department of Health and Human Services, and the Department of the Treasury (the Departments) to submit an annual report to Congress concerning NQTL comparative analyses and compliance with MHPAEA.

On July 25, 2023, the Departments released the 2023 MHPAEA Comparative Analysis Report to Congress ([available here](#)). Like the previous report to Congress, submitted January 25, 2022 ([available here](#)), the Departments describe numerous NQTLS that commonly presented compliance issues for the audited group health plans. The 2023 Report to Congress also reiterates that MH/SUD parity and compliance with MHPAEA remain “a top enforcement priority.”

The Good: Identification of Enforcement Priorities and Potential Correction Methods

The 2023 Report to Congress includes a list of six NQTL enforcement priorities for MHPAEA compliance efforts by the Employee Benefits Security Administration (EBSA). This list adds two additional enforcement priorities that were not identified in the 2022 Report to Congress. The priorities named in the 2023 Report to Congress include:

1. Prior authorization requirements for in-network and out-of-network inpatient services;
2. Concurrent care review for in-network and out-of-network inpatient and outpatient services;
3. Standards for provider admission to participate in a network, including reimbursement rates;
4. Out-of-network reimbursement rates (methods for determining usual, customary, and reasonable charges);
5. Impermissible exclusions of key treatments for mental health conditions and substance use disorders (**new since the January 2022 Report**); and
6. Adequacy standards for MH/SUD provider networks (**new since the January 2022 Report**).

Naming enforcement priorities will help plan sponsors tailor NQTL comparative analyses to address the specific concerns targeted most frequently by regulators.

The 2023 Report to Congress includes a list of eight different correction methods that non-compliant plans may use to bring prohibited NQTLs into compliance with MHPAEA. These correction methods include:

1. Complete removal of an NQTL;
2. Changes to plan document language and disclosures, along with notification to participants and beneficiaries of the change in plan terms;
3. Amendments to plan practices or claims processing procedures;
4. Addition of coverage for previously excluded benefits;
5. Reduction in the scope of an NQTL's application to MH/SUD benefits;
6. Submission of a complete and sufficient comparative analysis, cured of identified deficiencies;
7. Re-adjudication of claims affected by an impermissible NQTL, with payment of claims for wrongfully denied because of the NQTL; and
8. Notice to participants and beneficiaries of an opportunity to submit previously unsubmitted claims that will now be accepted for processing.

In addition to naming enforcement priorities and correction methods, the 2023 Report to Congress includes numerous examples of correction methods used in connection with EBSA enforcement actions. These examples name (i) the NQTL investigated, (ii) the substantive issue under MHPAEA related to the NQTL, (iii) the specific enforcement action involved, and (iv) the corrective action taken to correct the NQTL. A summary of some of the corrections is below.

Example #1: Exclusion for MH/SUD Residential Treatment Facilities and Reprocessing of Claims

Issue: A self-funded plan did not cover MH/SUD benefits at residential treatment facilities but covered stroke and other rehabilitation benefits at medical/surgical residential facilities. The plan did not have a comparative analysis explaining the difference in coverage when EBSA requested such comparative analysis.

Action: EBSA's Atlanta Regional Office issued a determination letter citing the plan for imposing an impermissible NQTL.

Correction: The plan removed the exclusion and reprocessed previously denied MH/SUD residential treatment claims and the plan will cover MH/SUD residential treatment claims going forward.

Example #2: Using an Employee Assistance Program (EAP) as a Gatekeeper for MH/SUD Services

Issue: Participants of a multiple employer welfare arrangement who sought MH/SUD benefits were directed to call a phone number listed on their plan membership card. This phone number was linked to the plan's EAP provider, which used prescreening questions to determine whether to direct participants to EAP counselors or refer the participant to an in-network provider for MH/SUD services. The plan did not use the EAP or another provider as a gatekeeper for any medical/surgical benefits.

Action: EBSA's Los Angeles Regional Office issued an initial determination of non-compliance to the plan, citing the practice of using the EAP as a gatekeeper for MH/SUD benefits as an impermissible NQTL.

Correction: The plan stopped using the EAP as a gatekeeper for MH/SUD benefits, removed the NQTL from plan documents, and issued new plan membership cards with updated information.

Example #3: Removal of Exclusion for Inpatient Substance Use Disorder Treatment Unless the Participant Completes the Entire Course of Treatment

Issue: A self-funded plan excluded coverage for inpatient SUD benefits unless the participant completed the entire course of treatment. The plan did not have a similar restriction for inpatient medical/surgical benefits.

Action: EBSA's Chicago Regional Office issued an initial determination of non-compliance to the plan because the plan's comparative analysis was deficient and failed to show how the NQTL was applied in parity.

Correction: The plan removed the NQTL from plan documents.

Example #4: Applied Behavioral Analysis (ABA) Therapy for Autism Spectrum Disorder (ASD)

The 2023 Report to Congress also includes several examples related to exclusions for ABA therapy for ASD. Previously cited in the 2022 Report to Congress as a common impermissible NQTL, EBSA expressed its continued commitment to ensuring participants and beneficiaries with ASD in ERISA-covered plans can access ABA therapy treatment. Corrections for impermissible exclusions of ABA therapy generally include removing the relevant exclusions from plan documents and reprocessing claims.

Appendix A to the 2023 Report to Congress describes the content requirements for each comparative analysis. Each comparative analysis must demonstrate "that the processes, strategies, evidentiary standards, and other factors used to apply an NQTL to MH/SUD benefits, as written and in operation, are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, and other factors used to apply the NQTL to medical or surgical benefits in the benefits classification." Similar to the 2022 Report to Congress, Appendix A states that "nearly all the initial comparative analyses

EBSA has reviewed have not contained the specific information required under ERISA Section 712(a)(8)(A) (i)-(v) that is necessary to assess compliance.”

The Bad: Increased Enforcement and Service Provider Investigation Actions

According to the 2023 Report to Congress, “EBSA is currently devoting nearly 25 percent of its enforcement program to work focusing on MHPAEA NQTLs.” Furthermore, EBSA has increased the size of its NQTL enforcement team to add “over 30 investigators and technical experts.” Even so, the 2023 report acknowledges that “even with the recent increase in staffing and resources devoted to MHPAEA NQTL enforcement, DOL’s enforcement resources—both in EBSA and for the necessary legal support provided by the Office of the Solicitor—are limited compared to the vast universe that it regulates.” As a regulatory body for “a total of 3.9 million ERISA-covered plans covering 152 million participants and beneficiaries[,] EBSA has 1 investigator for every 7,700 health plans (and roughly 1 investigator for every 12,200 plans, once retirement plans and other welfare plans, which are also under EBSA’s jurisdiction, are considered).” Nevertheless, “EBSA has undertaken unprecedented enforcement action” since the enactment of CAA 2021. This enforcement action includes (i) requesting comparative analyses for hundreds of NQTLs and (ii) obtaining corrections for NQTL issues that have resulted in the reversal of denials of claims for MH/SUD benefits.

The 2023 Report to Congress also notes that “[f]or all NQTL areas, including [enforcement] priorities, EBSA develops investigative leads through careful review of plan documents and examination of plan operations among EBSA’s open health case inventory. EBSA also gathers leads from other sources, such as state and federal regulatory partners, media reports, private litigation, participant or beneficiary complaints, professional associations, and patient advocacy groups.” The 2023 Report to Congress explains that EBSA has expanded its MHPAEA investigation practices to acquire information about plans under investigation by contacting service providers before contacting plan officials. Under this approach, EBSA directly contacts service providers before contacting the plans they serve in order to:

1. Clarify whether the service provider administers plans that have these exclusions, and determine which plans are affected;
2. Gather information on whether the service provider has, or the plans it serves have, conducted a comparative analysis that demonstrates compliance for the NQTL; and
3. Work with the service provider to correct impermissible exclusions.

To date, EBSA worked with more than 20 service providers, including some of the largest service providers administering plans across the country.

The Ugly: Non-Compliant Plans Publicly Identified

Section 712(a)(8)(B)(iv)(I) of ERISA requires the annual MHPAEA Comparative Analysis Report to Congress to include “the identity of each group health plan or health insurance issuer, with respect to certain health insurance coverage that is determined not to be in compliance after the final determination by the Secretary...” The 2023 Report to Congress lists three group health plans that were issued a final determination of non-compliance by EBSA. In addition to the name of each non-compliant plan, the 2023 Report to Congress lists the employee identification number, plan number, number of participants, and

date the final determination of non-compliance was issued for each non-compliant plan.

Centers for Medicare and Medicaid Services Enforcement Actions.

The Centers for Medicare and Medicaid Services (CMS), on behalf of the Department of Health and Human Services carries out MHPAEA enforcement functions under the Public Health Services Act. CMS is responsible for MHPAEA enforcement for issuers in states that do not have authority to enforce, or fail to enforce, MHPAEA as well as for non-federal government group health plans in all states. During the Reporting Period, CMS requested a total of 21 comparative analyses across 7 NQTLs for Plan Year 2022. Like EBSA, CMS is also required to identify the non-federal governmental plans and health insurance issuers that were issued a final determination of non-compliance. CMS determined that five issuers/plans were not in compliance with MHPAEA. CMS requires that plan sponsors and issuers that receive a final determination of noncompliance provide proof that the required corrective actions have been completed and follows up with issuers/plans to ensure that such corrective actions are taken.

All plan sponsors and issuers that received a final determination of non-compliance were required, within 7 days of the date of the final determination letter, to notify all individuals who were enrolled under the impacted plans that such coverage was determined to be out of compliance with MHPAEA. In all cases in which a plan sponsor or issuer received a final determination of non-compliance, the plan sponsor or issuer did not provide sufficient information and supporting documentation in its comparative analyses.

Key Take-Aways

- MHPAEA compliance is an enforcement priority for the Departments.
- Plans must have complete, accurate comparative analyses for each NQTL, and such analyses must be available upon request.
- Administrative services agreements with service providers should limit what information can be shared without plan approval, and also require notice if the service provider receives a request to disclose plan data.

If you have any questions concerning your group health plan’s NQTL comparative analyses or MHPAEA compliance, contact your Vorys employee benefits attorney.