Mental Health Parity Compliance: Report to Congress Sheds Light on NQTL Comparative

A Practical Guidance® Article by
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The U.S. Departments of Labor, Health and Human Services, and Treasury issued their 2022 Report to Congress regarding their enforcement activities under the Mental Health Parity and Addiction Equity Act as required under the Consolidated Appropriations Act of 2021, which mandates that group health plans offering medical/surgical and mental health/substance use disorder coverage that impose non-quantitative treatment limitations on such benefits provide comparative analyses and documentation demonstrating compliance.

Refer to a previous LawFlash and ML BeneBits blog post for more detail on the Consolidated Appropriations Act of 2021 (CAA) and the Mental Health Parity and Addiction Equity Act (Mental Health Parity).

Report to Congress

The Report to Congress (Report), issued on January 25, offers insight into the enforcement action undertaken by the Departments of Labor, Health and Human Services, and Treasury (collectively, Departments), specifically the Employee Benefits Security Administration (EBSA) of the Department of Labor (as it applies to employer-sponsored group health plans) by way of statistical information and specific findings. The key takeaways from the Report include the following:

- The top four non-quantitative treatment limitations (NQTLs) for which the EBSA requested a comparative analysis include (1) preauthorization or precertification requirements; (2) network provider admission standards; (3) concurrent care review; and (4) limitations on applied behavior analysis or treatment for autism spectrum disorder.
- **None** of the comparative analyses initially reviewed to date have been sufficient (156 letters were issued). This is a key affirmation for plans under current audit that continue to pedal through insufficiency notices from the Departments wondering what exactly will constitute a "sufficient" comparative analysis.
- The Department of Labor indicated that the comparative analyses reviewed were deficient because they (1) failed to identify the benefits, classifications, or plan terms to which the NQTL applies; (2) failed to describe in sufficient detail how the NQTL was designed or how it is applied in practice to mental health/substance use disorder (MH/SUD) benefits and medical/surgical benefits; (3) failed to identify or define in sufficient detail the factors, sources, and evidentiary standards used in designing and applying the NQTL to MH/SUD and medical/surgical benefits; (4) failed to analyze in sufficient detail the stringency with which factors, sources, and evidentiary standards are applied; and/or (5) failed to demonstrate parity compliance of NQTLs as written and in operation.

- In addition, the Report indicates the main themes in deficiencies, including, among others, the failure to document comparative analysis before designing and applying the NQTL, conclusory assertions lacking specific supporting evidence or detailed explanation, lack of meaningful comparison or meaningful analysis, and non-responsive comparative analyses that did not address the specific NQTLs or were generically prepared by a service provider and not specific to the plan at issue.
- The Report emphasizes that the goal of the Departments' enforcement action is to provide increased access for MH/SUD benefits for participants and beneficiaries and cites to instances where group health plans took corrective action to demonstrate its success.
- The Report also continues to echo the Departments' position that the requirement to demonstrate compliance with Mental Health Parity, particularly with respect to imposing NQTLs, is not a new requirement and includes an analysis of the unpreparedness of many plan sponsors and insurers, noting that approximately 40% of plans and insurers responded to EBSA's initial request letter with a request for an extension of time to respond because they did not have prepared comparative analyses. While plan sponsors may have been caught off guard, it doesn't mean that they weren't in compliance. In fact, many plan sponsors that maintain self-insured plans rely predominately on their third-party administrators (TPA) for compliance with Mental Health Parity and, therefore, weren't in the position to perform the comparative analyses themselves. Since TPAs have also struggled with putting together sufficient comparative analyses, plan sponsors are scrambling to figure out how to best work with their TPAs or other service providers to produce a comparative analysis that the Departments would deem sufficient.
- The Report makes clear that the Departments, specifically EBSA, has significantly expanded staffing (from 15 to 500 investigators, managers, benefits advisors, and attorneys from the Office of the Solicitor), developed tools for use in investigations, and retained contractor support for enforcement of Mental Health Parity NQTL provisions. Therefore, plan sponsors should ramp up their compliance strategies and ensure they are taking swift action to ensure that their comparative analyses are ready should a demand be made by the Departments.

Finally, to enhance enforcement, the Report recommends Congress:

- Implement civil monetary penalties for parity violations
- Amend ERISA to expressly provide EBSA with the authority to directly pursue third parties that provide administrative services to group health plans for parity violations
- Amend ERISA to expressly provide participants and beneficiaries the ability to recover amounts for parity violations –and–
- Expand access to telehealth and remote care services

These recommendations shed light on the path that Mental Health Parity compliance enforcement may take in the future. While access to mental health services is the primary driver for the Departments, it seems clear from these recommendations that the Departments would like to increase their authority by expanding enforcement jurisdiction and directly auditing insurer and TPA practices.

While the Department of Labor has historically provided FAQs and a Mental Health Parity Self-Compliance Tool, which has an entire section covering NQTLs, it has not provided much more in the way of guidance for plans to ensure that they comply with this new CAA comparative analyses requirement. Ideally, the Departments will issue additional guidance clarifying the comparative analyses requirement under the CAA and offer a template which will guide plan sponsors and TPAs to create a sufficient comparative analysis; however, it is unclear if and when that may occur. The Report is also helpful as it provides a window into what the Departments are focused on and what plans should ensure that their comparative analyses address.

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