

Fiduciary Check In: The Fiduciary's Role in Ensuring Mental Health Access: Looking Beyond Parity

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Mental Health Parity and Its Impact on Health Plan Sponsor Fiduciary Obligations

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Health plan sponsors have a fiduciary obligation to disperse plan assets in a prudent manner for the exclusive benefit of plan participants and beneficiaries.

The standard to carry out such obligation for a health plan is simply a “good faith compliance effort”.

Unfortunately, there are not hard and fast “safe harbors” as to what constitutes a “good faith compliance effort” for health plans so plan sponsors are left to exercise their responsibilities in a “prudent” manner.

Peters vs Aetna Inc

Fourth Circuit revived ERISA breach of fiduciary duty and prohibited transaction claims against Aetna.

Significance is that a plan participant brought a Class Action suit alleging violations of the exclusive benefit rule.

This is a sneak peak and what plan sponsors risk if they do not follow a plan fiduciary compliance process!!



Strengthening Parity in Mental Health and Substance Use Disorder Benefits

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Strengthening Parity in MH/SUD Benefits

- Signed into law on December 27, 2021
- Requires group health plans to perform and document comparative analyses of the design and application of nonquantitative treatment limitations (NQTLs)
- Plans must be prepared to make these comparative analyses available to the Departments of Labor and/or Health and Human Services upon request beginning 45 days after the date of enactment (February 10, 2021)



Strengthening Parity in MH/SUD Benefits

The new amendments also include requirements related to:

- Updated compliance program guidance
- An approach to corrective action
- Annual reporting by the Departments regarding noncompliance
- Guidance regarding participant and beneficiary complaints
- Promotion of Federal and State information sharing



Strengthening Parity in MH/SUD Benefits

- Plans will need to work with benefit administrators to gather information so that the NQTL comparative analyses can be performed and documented
- Plans must consider getting the information collection and analysis underway to advance good faith compliance with the new statutory requirements
- DOL, HHS, and Treasury issued initial guidance regarding the new requirements on April 2, 2021 under FAQ Set 45

Additional guidance is expected. Once issued, a plan may need to do work to comply with any specific requirements provided by the agencies.

Examples of NQTLs

- Prior authorization or ongoing authorization requirements
- Concurrent review standards
- Formulary design for prescription drugs
- Standards for provider admission to participate in a network, including reimbursement rates
- Refusal to pay for higher-cost therapies until it can be shown that a lower-cost therapy is not effective (also known as “fail-first” policies or “step therapy” protocols)
- Exclusions of specific treatments for certain conditions



FAQ Set 45 NQTL Comparative Analysis Clarifications

The Departments clarify that a general statement of compliance, coupled with a conclusory reference to broadly stated processes, strategies, evidentiary standards or other factors related to NQTLs is insufficient to fulfill the new comparative analysis requirement.

FAQS ABOUT MENTAL HEALTH AND SUBSTANCE USE DISORDER PARITY IMPLEMENTATION AND THE CONSOLIDATED APPROPRIATIONS ACT, 2021 PART 45

April 2, 2021

The Consolidated Appropriations Act, 2021 (the Appropriations Act) amended the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) to provide important new protections. The Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury (collectively, "the Departments") have jointly prepared this document to help stakeholders understand these amendments. Previously issued Frequently Asked Questions (FAQs) related to MHPAEA are available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/mental-health-and-substance-use-disorder-parity> and https://www.cms.gov/ccio/resources/fact-sheets-and-faq#Mental_Health_Parity.

Mental Health Parity and Addiction Equity Act of 2008

MHPAEA generally provides that financial requirements (such as coinsurance and copays) and treatment limitations (such as visit limits) imposed on mental health or substance use disorder (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.¹ In addition, MHPAEA prohibits separate treatment limitations that apply only to MH/SUD benefits. MHPAEA also imposes several important disclosure requirements on group health plans and health insurance issuers.

The MHPAEA final regulations require that a group health plan or health insurance issuer may not impose a non-quantitative treatment limitation (NQTL) with respect to MH/SUD benefits in any classification unless, under the terms of the plan (or health insurance coverage) as written and in operation, any processes, strategies, evidentiary standards, or other factors used in applying the NQTL to MH/SUD benefits in the classification are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, or other factors used in applying the limitation to medical/surgical benefits in the same classification.² Under this analysis, 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. These processes, strategies, evidentiary standards, and other factors must be comparable and applied no more stringently for MH/SUD benefits than for medical/surgical benefits.

Since the enactment of MHPAEA, the Departments have issued guidance and compliance assistance materials to help stakeholders understand the law and its implementing regulations, including the requirements for NQTLs. Most recently, in September 2019, the Departments issued Final FAQs part 39.³ In an effort to promote compliance, the FAQs provided additional examples regarding how the NQTL requirements in the MHPAEA final regulations apply to different fact patterns.

The DOL also maintains on its website a MHPAEA Self-Compliance Tool that is intended to help group health plan sponsors and administrators, health insurance issuers, State regulators, and other stakeholders determine whether a group health plan or health insurance issuer complies with MHPAEA.⁴ The MHPAEA

¹ The six classifications of benefits defined in final regulations implementing the requirements of MHPAEA are: (1) inpatient, in-network; (2) inpatient, out-of-network; (3) outpatient, in-network; (4) outpatient, out-of-network; (5) emergency care; and (6) prescription drugs. 26 CFR 54.9812-1(c)(2)(ii); 29 CFR 2590.712(c)(2)(ii); and 45 CFR 146.136(c)(2)(ii).

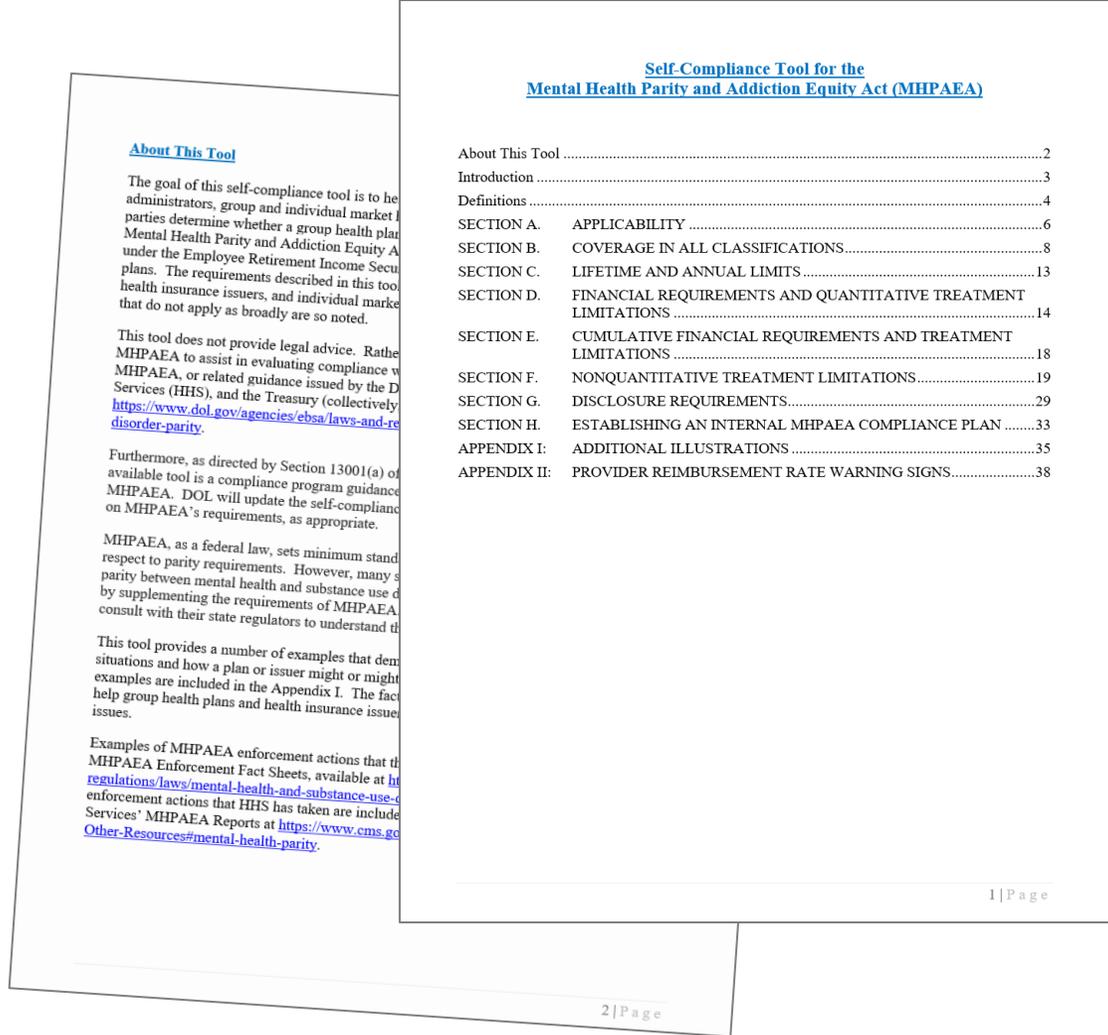
² 26 CFR 54.9812-1(c)(4)(i); 29 CFR 2590.712(c)(4)(i); and 45 CFR 146.136(c)(4)(i) and 147.160.

³ FAQs about Mental Health and Substance Use Disorder Parity Implementation and the 21st Century Cures Act Part 39 (Sept. 5, 2019), available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-39-final.pdf> and <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQ-Part-39.pdf>.

⁴ 2020 MHPAEA Self-Compliance Tool, available at <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/self-compliance-tool.pdf>.

FAQ Set 45 NQTL Comparative Analysis Clarifications

The Departments point to the DOL's [MHPAEA Self-Compliance Tool](#) as a source of guidance related to requirements for NQTLs, including a process for analyzing whether a particular NQTL meets those requirements.



Tips to Avoid as Insufficient Comparative Analysis

The FAQs provide examples of reasons why the Departments might conclude that documentation of comparative analyses of NQTLs is insufficiently specific and detailed.

- 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 explanations
- Identification of processes, strategies, sources and factors without the required or clear and detailed comparative analysis



Tips to Avoid as Insufficient Comparative Analysis

- Identification of factors, evidentiary standards, and strategies without a clear explanation of how they were defined and applied in practice
- Reference to factors and evidentiary standards that were defined or applied in a quantitative manner, without the precise definitions, data, and information necessary to assess their development or application
- Analysis that is outdated due to the passage of time, a change in plan structure, or for any other reason



Supporting Information

In addition, the Departments clarify that plan sponsors should be prepared to make available documents that support the analysis and conclusions of their NQTL comparative analyses.



For example, they note:

If comparative analyses reference studies, testing, claims data, reports, or other considerations in defining or applying factors (such as meeting minutes or reports showing how those considerations were applied), then the plan or issuer should be prepared to provide copies of all those items.

Requests and Complaints

A participant, beneficiary or enrollee (or their authorized representative) or a state regulator, may request an NQTL comparative analysis.

The Departments note that in the instance of a specific complaint, they may request information related to the NQTL in question, such as the comparative analysis related to prior authorization. However, the Departments remind plan sponsors that, under the amendments to MHPAEA, the DOL or HHS may also request NQTL comparative analyses in any instance deemed appropriate.



What to Expect from the Federal Departments

DOL/HHS Collection of NQTL Analyses

- The Act permits the DOL and HHS to request these analyses in any circumstances the department finds appropriate.
- It requires the departments to collect them in instances of potential noncompliance or complaints regarding noncompliance.
- The departments are required to collect at least 20 NQTL analyses per year.
- Enforcement actions related to these requirements have begun and include very strict request timeframes.

Enforcement Priorities

- The FAQs do not provide an exhaustive list of NQTLs regarding which the Departments may request the comparative analysis and reinforce the need to perform and document comparative analyses for all NQTLs imposed.
- In the near term, the DOL indicates that it expects to focus its enforcement efforts on:
 - Prior authorization requirements
 - Concurrent review requirements
 - Standards for provider admission to participate in a network (including reimbursement rates)
 - Out-of-network reimbursement rates



Failure to Comply

The FAQs emphasize the consequences of failure to satisfy the comparative analysis requirements.

- The plan or issuer must submit additional comparative analyses that demonstrate compliance not later than 45 days after the initial determination of noncompliance.
- Following the 45-day corrective action period, if the Departments make a final determination that the plan or issuer is still not in compliance, the plan will then have seven days to notify covered individuals that the plan is not in compliance.





Next Steps for Plan Sponsors

What can plans do now?

- Develop an approach to good faith compliance with the statute.
 - Determine a plan to begin to collect and document relevant information. This will most commonly include coordination with benefit administrators (both medical and pharmacy) to help review the plan's NQTL compliance as written and in operation.
 - Plan sponsors should anticipate that some compliance issues may be identified and need to be resolved.
- Watch for forthcoming guidance.
 - This may include additional FAQs, regulatory guidance, updates to the DOL self-compliance tool, and/or other clarifying information that may be published by the Departments.

Questions?



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