HAYS COMPANIES

Mental Health Parity and Addiction Equity Act

Self-Insured Medical Plans Must Conduct Comparative Analyses of Non-Quantitative Treatment Limitations

By Scott Wold

Self-insured medical plans are subject to a new requirement under the Mental Health Parity and Addiction Equity Act (MHPAEA) that requires the plan to conduct comparative analyses on the plan's non-quantitative treatment limitations (NQTLs). With the compliance date in early February, sponsors of self-insured medical plans need to address this issue now. Unfortunately, compliance with the new requirement is quite cumbersome and, to a large extent, is dependent on the third-party administrator's (TPA's) willingness to provide assistance.

Legal Requirements

Under the MHPAEA, the processes, strategies, evidentiary standards, or other factors used to apply NQTLs to a plan's mental health and substance use disorder (MH/SUD) benefits must be comparable to, and applied no more stringently than, the processes, strategies, evidentiary standards, and other factors used to apply NQTLs to medical or surgical benefits. The DOL has provided the following (non-exhaustive) list of NQTLs:

- Medical management standards limiting or excluding benefits based on medical necessity or medical appropriateness, or based on whether the treatment is experimental or investigative;
- Prior authorization or ongoing authorization requirements;
- Concurrent review standards;
- Formulary design for prescription drugs;
- For plans with multiple network tiers (such as preferred providers and participating providers), network tier design;
- Standards for provider admission to participate in a network, including reimbursement rates;
- Plan methods for determining usual, customary, and reasonable charges;
- 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;

Note: The new comparative analysis requirement also applies to fully-insured group medical plans, but in that situation, the law applies directly to the health insurance carrier, and the carrier should be conducting the comparative analyses. Plans sponsors should confirm this fact with the carrier.

- 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; and
- 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.

The COVID relief bill enacted in December 2020 amended the MHPAEA to specifically require self-insured plans that impose NQTLs on MH/SUD benefits to perform and document comparative analyses of the design and application of NQTLs to determine whether they comply with the MHPAEA requirements described above. The plan must make available the following information regarding the comparative analyses upon request of the DOL:

- The specific terms of the NQTLs applicable under the plan and a description of the MH/SUD benefits to which the NQTLs apply;
- The factors used to determine that NQTLs will apply to MH/SUD benefits and medical or surgical benefits;
- The evidentiary standards and other source or evidence relied upon to apply the NQTLs;
- The comparative analyses of the NQTLs; and
- The specific findings and conclusions reached as a result of the comparative analyses.

> The law authorizes the DOL to begin requesting this information as early as **February 10, 2021** (i.e., 45 days after the date of enactment of the new COVID relief bill). Although it is not clear when the DOL will actually begin requesting this information from plans, plan sponsors should act now to prepare for such a request.

DOL Resources

The DOL has previously made available a MHPAEA self-compliance tool that is intended to assist plan sponsors in helping determine whether their plans are compliant with the law. The tool, which was most recently updated in October 2020 (prior to the amendment to the MHPAEA described above), is available here.

The self-compliance tool contains a lengthy section on NQTLs and, to a large extent, the tool tracks the new NQTL comparative analysis requirements. For instance, the tool identifies the following four specific steps to determine whether a plan's NQTLs are compliant:

- Identify the NQTL.
- Identify the factors considered in the design of the NQTL.
- Identify the sources (including any processes, strategies, or evidentiary standards) used to define the factors identified above to design the NQTL.
- Indicate whether the processes, strategies, and evidentiary standards used in applying the NQTL comparable are no more stringently applied to MH/SUD than to medical/surgical benefits, both as written and in operation.

The first three steps match up with the first three pieces of information a plan sponsor must provide to the DOL to demonstrate it has complied with the comparative analysis requirement, and the fourth step is similar to the final piece of information that must be provided. However, the tool does not specify the content of the comparative analyses that must be produced to the DOL, nor does it fully explain how the comparative analysis must be conducted. Accordingly, although it might be helpful, completion of the steps identified in the self-compliance tool may not constitute full compliance with the new requirements. We expect the DOL to further modify the self-compliance tool and/or issue additional guidance that will assist plan sponsors in complying with the comparative analysis requirement at some point in the future.

Practical Considerations

A plan sponsor's ability to conduct the required comparative analyses of NQTLs is hampered by several practical realities. For instance, the data needed to conduct the comparative analyses is almost entirely held by the TPA (not the plan sponsor). To conduct the comparative analyses, one must identify the factors considered in the design of the NQTL (e.g., excessive utilization; recent medical cost escalation; provider discretion in determining diagnosis; lack of clinical efficiency of treatment or service; etc.) and the sources used to define those factors (e.g., internal claims analysis; medical expert reviews; state and federal requirements; national accreditation standards; internal market and competitive analysis; Medicare physician fee schedules; and evidentiary standards). Plan sponsors generally do not possess this information.

Furthermore, TPAs may claim that some of the information needed to conduct the comparative analyses is proprietary and, as a result, may refuse to disclose the information to the plan sponsor or its advisors. Even if the TPA agrees to share it, the data needed will be voluminous and, in some cases, very technical. The person conducting the comparative analyses will likely need extensive knowledge of the health insurance industry.

Based on the foregoing, it will be challenging for a plan sponsor to conduct the comparative analyses itself. Plans sponsors almost certainly will need the assistance of outside experts, which might be quite costly given the scope of the work involved in a comparative analysis. Most (if not all) of a plan's NQTLs are established and controlled by the TPA. Even if they conclude that one or more of the plan's NQTLs are not compliant with the MHPAEA, a plan sponsor and/or its advisors may have difficulty convincing the TPA to modify the internal processes, strategies, evidentiary standards, and other factors used in applying the NQTLs to MH/SUD benefits. Presumably, the TPA believes the use of those internal processes, strategies, evidentiary standards, and other factors is compliant with the law, especially if the TPA operates as an insurance carrier and uses the same or similar internal processes, strategies, evidentiary standards, and other factors for its insured book of business.

Next Steps

Based on the foregoing, we recommend plan sponsors seek assistance from their TPA to comply with the new comparative analysis requirement. Ideally, the TPA should conduct the required comparative analyses. In many cases, the TPA will already have completed them in order to comply with various state laws imposing the same or similar obligation on insurance companies. Even if it has not already done them, the TPA is now required by the MHPAEA to conduct the comparative analyses with respect to its fully-insured plans (if it also operates as an insurance carrier), and it is in a far better position to conduct the comparative analyses on the self-insured plans it administers.

Nevertheless, we expect plan sponsors may receive some push back from the TPA. In fact, we have already heard some TPAs are stating they will not conduct the comparative analysis for their self-insured customers. In that case, a plan sponsor's options are somewhat limited at this point. Going forward, a plan sponsor should negotiate the TPA's agreement to conduct the comparative analyses as part of the contract renewal process. In the meantime, plan sponsors and their advisors should attempt to convince the TPA to conduct the comparative analyses even though the TPA presumably does not have a contractual obligation to do so.

If those efforts fail, a plan sponsor should take steps to demonstrate a good faith attempt to comply with the requirement. For example, it could ask the TPA to provide some type of representation or certification that the TPA has determined the processes, strategies, evidentiary standards, and other factors it uses to apply NQTLs to MH/SUD benefits under the plan sponsor's plan are compliant with the MHPAEA. Another option is for the plan sponsor to hire a third-party (e.g., an attorney with knowledge of the MHPAEA) to begin the comparative analysis process. This would involve requesting detailed information from the TPA and attempting to perform a basic comparative analysis on each NQTL based on the information provided, which might be limited.

If you have questions regarding this new compliance requirement, please contact your Hays Companies service team member.

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