



Departments Propose New Regulations on Mental Health Parity Testing

August 2023

The Departments of Labor, Treasury, and Health and Human Services (the Departments) released proposed regulations on the nonquantitative treatment limit (NQTL) requirements of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA).

These proposed regulations implement new requirements and clarify existing requirements for group health plans to comply and demonstrate compliance with the NQTL provisions of MHPAEA. If finalized, the regulations would be effective for plan years beginning on or after January 1, 2025. The Departments are requesting comments on these proposed regulations.

The Departments also issued a technical release requesting comments on proposed data requirements for plans to demonstrate that their mental health and substance use disorder (MH/SUD) provider networks meet MHPAEA standards.

This Aon bulletin discusses:

- Employer Health Plan Compliance With MHPAEA
- Impact of Proposed Regulations on NQTL Testing
- Impact on Sponsors of Employer Group Health Plan
- Technical Release 2023-01P

Employer Health Plan Compliance With MHPAEA

Under MHPAEA, group health plans that provide MH/SUD benefits must design and administer those benefits in parity with medical/surgical benefits under the plan. Specifically, a group health plan must apply the plan's financial and quantitative treatment limits (e.g., copayment, co-insurance, visit limits) and NQTLs (any non-numeric treatment limitations, such as pre-authorization requirements, provider reimbursement rates, network admission criteria) to both medical/surgical benefits and MH/SUD benefits in a manner that complies with MHPAEA.

To demonstrate compliance, a group health plan must conduct a comparative analysis of its NQTLs as applied to medical/surgical benefits and MH/SUD benefits in design and operation. The analysis must include certain detailed information and be provided to the Departments upon request. Although the Departments began asking plans for this information starting in February 2021, group health plan sponsors have requested additional Department guidance on conducting this analysis.

Impact of Proposed Regulations on NQTL Testing

The proposed regulations primarily focus on the NQTL requirements of MHPAEA and would, if adopted in final form, prohibit group health plans from imposing NQTLs on MH/SUD benefits unless the plan:

- Can show that the NQTL is no more restrictive when applied to MH/SUD benefits than when applied to medical/surgical benefits;
- Satisfies requirements on the design and application of the NQTL; and
- Collects and considers relevant data on access to MH/SUD benefits relative to access to medical/surgical benefits and takes action to address any material differences shown in the data.

The proposed regulations also provide that group health plans:

- Must demonstrate that “processes, strategies, evidentiary standards, and other factors” used in applying an NQTL to MH/SUD benefits are comparable to and no more stringently applied than those used to apply the NQTL to medical/surgical benefits in the same classification (definitions and explanations are provided);
- Must collect and evaluate specific outcomes data to assess the impact of NQTLs on MH/SUD benefits, using testing similar to that required for compliance with the financial/quantitative testing (i.e., applying the substantially all and predominant tests);
- May use two narrow NQTL exceptions to the above rules for NQTLs to the extent they are consistent with generally recognizable independent professional medical or clinical standards and/or are based on standards related to fraud, waste, and abuse;
- Must address differences in network composition for providers of MH/SUD benefits and document that disparities in the plan’s network of MH/SUD providers are due to a provider shortage, rather than to NQTLs such as reimbursement rates or network qualification standards;
- Must include updated definitions of “medical/surgical benefits,” “mental health benefits,” and “substance use disorder benefits” using current medical practice standards, such as *The Diagnostic and Statistical Manual of Mental Disorders* and the International Classification of Diseases;
- Must implement detailed rules for the NQTL comparative analysis and must make that analysis available to the Departments;
- Cannot have a limit that applies only to a MH/SUD benefit and not to a medical/surgical benefit in a particular classification and must provide meaningful benefits for MH/SUD conditions as compared to medical/surgical benefits in a classification. (Examples of violations include covering developmental evaluations for autism spectrum disorder but not for applied behavior therapy, and covering diagnosis and treatment of eating disorders, but not covering nutritional counseling if covered to treat a medical/surgical condition.); and

- Must implement the sunset provision for self-insured nonfederal governmental plans who may have previously opted out of MHPAEA but will now be subject to the requirements.

Impact on Sponsors of Employer Group Health Plan

Plans will have to comply with the requirements set out above. In addition, the Departments note that plans will not only have to provide the NQTL comparative analysis to the Departments upon request, group health plans must also provide the comparative analysis to participants upon request within 30 days under ERISA. With the comparative analysis, the named plan fiduciaries will have to certify that the fiduciary has reviewed the comparative analysis and that the analysis was found to comply with the content requirements. Plans must prepare and maintain an NQTL comparative analysis, not wait to prepare the comparative analysis until requested by the Departments. A final determination of noncompliance with the comparative analysis requirement, including failure to provide the comparative analysis, will be a violation of the substantive NQTL requirements under MHPAEA.

The Department of Labor notes that while it has limited direct enforcement authority over plan service providers, those service providers may be fiduciaries under ERISA and subject to co-fiduciary liability under ERISA. The Department of Labor states that it will use its authority to ensure compliance with MHPAEA for all entities that play a role in administering and designing benefits.

If finalized, these rules would apply on the first day of the plan year on or after January 1, 2025, although the Departments note that plans must continue to comply with the existing regulatory and statutory requirements. Comments on the proposed regulations are due by October 2, 2023.

Technical Release 2023-01P

The Departments also issued Technical Release 2023-01P setting forth concerns about the adequacy of MH/SUD provider networks and the impact on access to MH/SUD services. The Departments set out outlining principles to address these concerns and request comments on the Technical Release to inform future guidance on this issue.

The Departments outline four specific types of data they are considering requesting from plans as part of the comparative analyses for NQTLs related to network composition:

- **Out-of-network utilization:** the percentage of covered and submitted out-of-network claims for MH/SUD benefits as compared to medical/surgical benefits for the previous two calendar years.
- **Percentage of in-network providers actively submitting claims:** the percentage of in-network providers who did not submit in-network claims and the percentage of in-network providers who submitted claims for less than five (5) participants; this is designed to address concerns that provider directories may include in-network providers who are not actively providing services (“ghost networks”).
- **Time and distance standards:** data on the percentage of participants who can access, within a specific time and distance, in-network MH/SUD providers in one or more categories (e.g., psychiatry, in-patient care, opioid treatment providers, child and adolescent providers, etc.).

- **Reimbursement rates:** payments and billed charges for MH/SUD benefits as compared to medical/surgical benefits and to Medicare reimbursement rates.

The Departments are considering whether the four types of data described above can be used to develop an enforcement safe harbor with respect to NQTLs related to network composition. The enforcement safe harbor potentially would apply for plans that meet or exceed specific data-based standards identified in future guidance for a specific period of time. The Departments are requesting comments on the data collection requirements and potential safe harbor. Comments must be received no later than October 2, 2023.

Resources

The proposed regulations are available [here](#).

The news release is available [here](#).

Technical Release 2023-01P is available [here](#).

The 2022 MHPAEA Enforcement Fact Sheet is available [here](#).



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