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Sponsor a Health Plan? Take Note: New Mental Health Parity Final Rule is Effective for 2025

On September 9, 2024, the long-awaited final rule (Final Rule) implementing the non-quantitative treatment limit aspects of the Mental Health Parity and Addiction Equity Act (MHPAEA) was released. The Final Rule was jointly issued by the U.S. Departments of Labor (DOL), Health and Human Services and the Treasury (collectively, the Departments) and includes similar provisions to the Proposed Rule from August 2023. Employers and other health plan sponsors will face new obligations and consequences for noncompliance under the Final Rule, starting as soon as January 1, 2025, though a few obligations have a delayed effective date until 2026.

MHPAEA Background

Before summarizing the Final Rule, a reminder of where we are at this point may be helpful. The goal of MHPAEA is to ensure parity between mental health and substance use disorder benefits and medical/surgical benefits. In furtherance of this goal, MHPAEA prohibits group health plans and most insurers from imposing financial requirements or treatment limitations (including non-quantitative treatment limitations, or "NQTLs") that are stricter for mental health and substance use disorder benefits than for medical/surgical benefits. Examples of NQTLs include prior authorization and medical management requirements. Effective in 2021, Congress amended MHPAEA to require plan sponsors and insurers to prepare "comparative analyses" documenting how the NQTLs that apply to mental health and substance use disorder benefits not designed or applied more stringently than for medical/surgical benefits.

Although the overall goal of MHPAEA is clear, the law – especially regarding NQTLs – is notoriously grey and difficult to apply and administer. Plan sponsors have struggled since the law was passed to identify NQTLs and determine whether they meet the parity requirements. It has been unsurprising that in their last several annual reports to Congress, the Departments reported that plan sponsors and insurers are failing to sufficiently comply. With the publishing of the Final Rule, the Departments aim to provide more detailed guidance to help plan sponsors and insurers comply with MHPAEA, as MHPAEA remains a top enforcement priority for the Departments.

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Final Rule

The Final Rule largely tracks the requirements set forth in the Proposed Rules. Some key provisions of the Final Rule include:

- Plan sponsors and insurers must collect and analyze data and address differences in access to mental health and substance use disorder care;
- Plan sponsors and insurers are prohibited from applying an NQTL on mental health and substance use disorder benefits that is more restrictive than the predominant NQTL applied to substantially all medical/surgical benefits in the same classification (e.g., in-network, in-patient);
- Detailed requirements for comparative analyses to measure the impact of NQTLs, including evaluating standards related to network composition, out-of-network reimbursement rates, and medical management and prior authorization;
- Requiring plans to provide meaningful benefits for covered mental health conditions and substance use disorders in each classification in which meaningful medical/surgical benefits are provided;
- Prohibiting the use of discriminatory information when designing NQTLs; and
- Ending the option for self-funded non-Federal governmental plans to opt out of compliance with MHPAEA.

Key Issues for Plan Sponsors: Increased Consequences of Noncompliance

Group health plan sponsors should immediately consider several items from the Final Rule to demonstrate compliance:

- Short Timeline for Government Document Requests. The Final Rule solidifies the short turnaround time the Departments currently require for responses to their requests. In current Department requests, and under the Final Rule, plan sponsors must provide their comparative analyses within 10 business days. If a Department finds a comparative analysis deficient, sponsors have only 45 calendar days to make corrections. If a comparative analysis is still deemed insufficient following the 45-day correction period, the plan sponsor will face the consequences described below.

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- Stand-Alone Notice of Noncompliance and Public Naming in Report to Congress. After a Department makes a final finding of noncompliance, the plan sponsor must notify all covered persons within seven business days. The notice cannot be combined with other notices, and on the first page it must state, in at least 14-point font:
    - "Attention! The [Department of Labor/Department of Health and Human Services/Department of the Treasury] has determined that [insert the name of group health plan or insurer] is not in compliance with the Mental Health Parity and Addiction Equity Act."

  The plan sponsor will also be named as having violated MHPAEA in the Departments' next annual Report to Congress. Plaintiffs' attorneys may use these notices and Reports to Congress to file class action lawsuits.

- Stop Order for Noncompliant NQTLs. Additionally, if a Department makes a final finding of noncompliance, the Department could order the plan sponsor to stop applying the offending NQTL(s) until the plan is compliant. This could result in increased claim costs and additional fees from the plan's service providers.

Additionally, the Final Rule includes several requirements that apply specifically to employer-sponsored plans governed by the Employee Retirement Income Security Act of 1974 (ERISA):

- Disclosures. The Departments confirm that comparative analyses must be produced to covered persons within 30 days of a written request. An ERISA "plan administrator" (typically the same entity as the plan sponsor) that fails to produce its analyses on time could face penalties of up to $110 per day.

- Fiduciary Certification. The Final Rule requires one or more named plan fiduciaries under ERISA to review the comparative analyses and certify that the fiduciary engaged in a prudent process to select one or more qualified service providers to perform and document a comparative analysis in connection with the imposition of any NQTLs that apply to mental health and substance use disorder benefits, as well as satisfaction of the fiduciary's duty to monitor those service providers.

  In the alternative, a fiduciary could certify that the comparative analysis complies with the Final Rule's content requirements. This compliance

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certification was included in the Proposed Rule. The Departments removed the requirement from the Final Rule, though the DOL continues to emphasize that compliance with MHPAEA and the Final Rule is aligned with ERISA's fiduciary duty standards.

This new obligation could expose plan fiduciaries to liability if they cannot show that they engaged in a prudent process. We expect these certifications will be requested as part of the due diligence process in mergers and acquisitions.

Effective Date and Existing Legal Obligations

The Final Rule is effective for group health plans beginning on the first day of the plan year starting in 2025. For many plan sponsors, that means they will need to have a comparative analysis for each NQTL that complies with the Final Rule by January 1, 2025. However, the Final Rule delays the effective date for the following requirements until the first day of the plan year starting in 2026:

- That plans provide meaningful benefits for covered mental health condition or substance use disorders;
- That information relied on for designing NQTLs not be discriminatory; and
- The data collection and evaluation requirements.

The corresponding requirement to include these elements in the comparative analyses is likewise delayed until 2026.

Given the significant time and resources necessary to produce a sufficient comparative analysis, the short turnaround time for Department audits, and the consequences of noncompliance, plan sponsors should coordinate with legal counsel familiar with MHPAEA, as well as other service providers, to prepare and document, or update, their comparative analyses as soon as possible. Although a legal challenge to the Final Rule is widely expected, at a minimum the requirements enacted by Congress – including a comparative analysis for each NQTL – will remain in force.

If you have any questions about the potential impact these changes could have on your benefit plans or need assistance with preparing or updating comparative analyses, please contact a member of Reinhart's Mental Health Parity Team.

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