Morgan Lewis

MEMORANDUM

TO:	Board of Trustees, Warehouse Employees Union Local 730 Health & Welfare Fund
FROM:	Jim Kimble Merle DeLancey
DATE:	June 10, 2021
SUBJECT:	Compliance with Mental Health Parity and Addiction Equity Act: Comparative Analyses of Nonquantitative Treatment Limitations

The Consolidated Appropriations Act, signed into law on December 27, 2020, requires that group health plans demonstrate compliance with the nonquantitative treatment limitation requirements of the Mental Health Parity and Addiction Equity Act (MHPAEA). The chief requirement is that plans draft a comparative analysis of the nonquantitative treatment limitations (NQTLs) that apply to mental health or substance abuse disorder benefits and make the analysis and related information available to the Department of Labor (DOL) upon request. Additionally, DOL has taken the position that this information must be made available upon request to participants and beneficiaries.

The CAA states that plans should prepare a comparative analysis by February 10, 2021. On April 2, 2021, DOL issued a series of Q&As on implementation of the parity requirements in the CAA; the guidance stated that plans should be prepared to make their comparative analysis available upon request.[1] Accordingly, we recommend that the Plan begin reviewing compliance with the MHPAEA and drafting the comparative analyses.

A. Background on Non-Quantitative Treatment Limitations

Per DOL guidance, a NQTL is "generally a limitation on the scope or duration of benefits for treatment." The MHPAEA prohibits a plan from imposing or implementing NQTLs on mental health or substance abuse disorder benefits, in any classification,[2] either as written in the plan or in operation, unless the NQTL is comparable to and applied no more stringently than a medical and surgical benefit in the same classification. *See* 29 C.F.R. 2590.712(c)(4)(i).

The following is an illustrative 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;

[1] The guidance also states that additional guidance may be forthcoming.
[2] Under the MHPAEA, there are six classifications of benefits: inpatient in-network; inpatient out-of-network; outpatient in-network; outpatient out-of-network; emergency care; and prescription drugs.

- 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 or issuer 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;
- 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.

Thus, to the extent applicable, the foregoing NQTL examples applied by a plan to inpatient, in-network mental health and substance abuse disorder benefits cannot be more restrictive than the NQTLs applied to inpatient, in-network medical and surgical benefits. It is important to remember that MPHAEA does not prohibit plans from including NQTLs for mental health benefits. But if the plan does include a mental health NQTL in one of the six classifications, it must apply it to medical and surgical benefits in the same classification (such as inpatient/in-network, outpatient/out-of-network).

B. NQTL Comparative Analysis Steps

The CAA requires that plans draft a comparative analysis of all NQTLs but does not define "comparative analysis" or explain what it should include. Guidance issued by the DOL on April 2nd makes clear that plans should use DOL's MHPAEA self-compliance tool to analyze NQTLs.[3] However, that guidance also supplemented the self-compliance tool with additional and more complex analysis.

Section F, Question 7 of the self-compliance tool, as supplemented by the DOL guidance, sets out nine steps plans should take to complete an NQTL comparative analysis.

1. Describe the NQTL, including the plan terms and/or policies at issue. NQTLs can be written into a plan document or SPD, but may also be included in internal guidelines, provider contracts, or other materials. Plans should review all relevant materials to find NQTLs.

[3] See Section F, Question 7 of the Self-Compliance Tool, available online at http://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/self-compliance-tool.pdf.

2. List all benefits, both mental health/substance abuse disorder and medical/surgical, and the particular classifications of benefits, the NQTL applies to. Also determine how the NQTL is implemented and who makes the decision (for example, an Independent Review Organization).

3. Identify the factors, evidentiary standards or sources, or strategies or processes considered in the design of the NQTL. This step essentially asks the plan to identify the reason(s) the plan imposes a limit on benefit. Examples of factors include:

    - Excessive utilization;
    - Recent medical cost escalation;
    - Provider discretion in determining diagnosis;
    - Lack of clinical efficiency of treatment or service;
    - High variability in cost per episode of care;
    - High levels of variation in length of stay;
    - Lack of adherence to quality standards;
    - Claim types with high percentage of fraud; and
    - Current and projected demand for services

If multiple factors are involved, the plan should identify which factor was given the most weight in imposing the NQTL. To the extent the plan defines any of the evidentiary standards, sources, strategies, or processes in a quantitative matter, include the definitions.

4. Identify the sources used to define the factors identified in Step 3 to design the NQTL. Examples of sources include:

    - 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, including any published standards as well as internal plan or issuer standards, relied upon to define the factors triggering the application of an NQTL to benefits

The plan should marshal available evidence showing that the factors considered when imposing the NQTL. For example, if recent medical cost escalation for a particular treatment is a factor in requiring a step therapy protocol, the plan could point to internal market and competitive analysis and/or state and federal requirements.

5. Explain whether there is any variation in the application of a guideline or standard used by the plan or issuer between mental health/substance abuse disorder and medical/surgical benefits. If so, describe the process and factors used for establishing that variation.

6. If application of the NQTL turns on specific decisions in administration of the benefits, identify the nature of the decisions, the decision maker(s), the timing of the decisions, and the qualifications of the decision maker(s).

7. If the plan's analysis relies upon any experts, include an assessment of each expert's qualifications and the extent to which the plan or issuer ultimately relied upon each expert's evaluations in setting recommendations regarding both mental health/substance abuse disorder and medical/surgical benefits.

8. Analyze whether the processes, strategies, and evidentiary standards used in applying the NQTL are comparable and no more stringently applied to mental health/substance abuse disorder benefits and medical/surgical benefits, both as written and in operation, and state whether the result demonstrates compliance with MHPAEA.

9. Include the date of the comparative analyses and the name, title, and position of the person or persons who performed or participated in the analyses.

C. Specific NQTL Targets for DOL Enforcement

The April 2nd guidance states that DOL is specifically focusing on the following four NQTLs:

- Prior authorization requirements for in-network and out-of-network inpatient services;

- Concurrent review for in-network and out-of-network inpatient and outpatient services;

- Standards for provider admission to participate in a network, including reimbursement rates; and

- Out-of-network reimbursement rates (plan methods for determining usual, customary, and reasonable charges).

The guidance also notes that it may specifically request comparative analyses for NQTLs for which complaints are made. Prior guidance also warns that DOL will scrutinize medical necessity review requirements (e.g., requiring a medical necessity review after fewer visits for mental health/substance abuse disorder benefits than for medical/surgical benefits).

D. Additional Information DOL May Request

DOL also forewarned plans that it may request:

- Records that document NQTL processes and that detail how the NQTLS are applied to both mental health/substance abuse disorder and medical/surgical benefits.

- Documentation, including any guidelines, claims processing policies and procedures, or other standards that the plan has relied upon to determine that NQTLs apply no more stringently to mental health/substance abuse disorders than to medical/surgical benefits. Include any details as to how standards were applied, and any internal testing, review, or analysis to support the plan's rationale.

- Samples of covered and denied mental health/substance abuse disorder claims, and medical/surgical claims.

- If the plan delegates management of some or all mental health/substance abuse disorder benefits to a service provider, documents related to the service provider's compliance with MHPAEA.

E. Steps for Health Plan Trustees

DOL's initial direction for a plan to perform its comparative analysis using the Self Compliance Tool was at a high-level such that a plan (or its TPA) could perform the comparative analysis with little to no external assistance. DOL's April 2nd guidance changed this view. The April 2nd guidance's added requirements are to such a degree that plans should consider retaining a third-party consultant to perform and draft the comparative analysis.

Thus, to comply with the applicable laws and DOL guidance, we recommend the Trustees obtain a quote from the Fund Consultant, Segal, which has experience preparing comparative analyses like that required here and authorize the following steps:

1. Gather all plan documents, internal guidelines, and any other materials that may include NQTLs.

2. For each NQTL, complete the DOL self-compliance tool using the steps outlined in Section B above. Pay particular attention to any NQTLs noted in Section C.

3. Have all documents listed in Section D available.

4. Contact all plan service providers that review claims and ensure that each service provider has begun a parity analysis for all NQTLs using the self-compliance tool.