



Employer Health Plan Litigation over Residential Treatment and Wilderness Therapy

Nov 09, 2018

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If you keep tabs on employer group health plan litigation, you have perhaps noticed a substantial increase in lawsuits over plans denying coverage for various types of out-of-network residential treatment and “wilderness therapy” benefits during the last 18 months. These suits generally revolve around whether a plan has improperly denied some type of mental health or substance abuse residential treatment benefit that includes a non-traditional outdoor therapy component (i.e., wilderness or adventure therapy). A majority of these cases turn on whether the benefit denial is a violation of the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). Because of the MHPAEA factor in these cases, now is a good time to review guidance recently issued by the Department of Labor (DOL), the Internal Revenue Service (IRS), and Health and Human Services (HHS).

The MHPAEA, applicable to group health plans with more than 50 employees, generally provides that the financial requirements (e.g., co-pays and co-insurance) and treatment limitations (e.g., visit limits) for a plan’s mental health or substance abuse disorder benefits cannot be more restrictive than the predominant financial requirements and treatment limitations for traditional medical and surgical benefits offered under the plan.

On April 23, 2018, the DOL, in conjunction with the IRS and HHS, released a set of proposed frequently asked questions (FAQs), along with a number of other items including:

- A self-compliance tool for plans to evaluate their compliance with the MHPAEA.
- An updated form for participants requesting documentation from a health plan or insurer concerning treatment limits under the MHPAEA.

- A 2018 DOL report to Congress outlining the MHPAEA implementation.
- A fact sheet regarding 2017 enforcement of the MHPAEA.
- An action plan from HHS addressing enhanced enforcement of the MHPAEA.

Proposed FAQs

The [DOL's proposed FAQs](#) focus heavily on non-quantitative treatment limitation issues under the MHPAEA, as amended by the Affordable Care Act and the 21st Century Cures Act, and address the following issues:

- There are several warnings that discrepancies in practice between medical/surgical benefits and mental health/substance abuse benefits can result in violations even if the terms of the plan are neutral between the two. Examples specifically provide that plans cannot:
 - Deny (as experimental or investigative) claims for Applied Behavioral Analysis therapy to treat children with Autism Spectrum Disorder supported by professionally recognized treatment guidelines when the plan approves treatment for medical/surgical conditions that are supported by similar guidelines.
 - Set dosage limits for prescription drugs used to treat mental health/substance abuse disorders that are less than the professionally recognized treatment guidelines when the dosage limits set by the plan for medical/surgical benefits equal or exceed the treatment guideline limits.
 - Exclude coverage for inpatient out-of-network treatment outside of a hospital for eating disorders (i.e., a residential treatment facility) when the plan covers such treatments for medical/surgical conditions, and there is physician authorization and determination that the treatment is medically appropriate based on the clinical standards of care.

- The complete exclusion for a condition or disorder is not a treatment limitation as defined in the MHPAEA regulations.
- Discrepancies in the adequacy of networks can result in violations.
- The non-quantitative treatment limitations under the MHPAEA apply to the availability of both in-network and out-of-network coverage.
- Physical effects arising from a mental illness can, depending on what a plan says, be treated as part of a mental health/substance abuse condition or it can be considered a separate medical/surgical condition.
- Clarification on certain disclosure requirements under the MHPAEA confirming that plans with provider networks are required to disclose a list of its providers in the plan's Summary Plan Description (SPD) and can do so by offering a hyperlink or URL to find the up-to-date list. It must also meet the DOL's electronic disclosure rules.

Other Guidance Items

[The DOL also released a self-compliance tool](#) that will be updated every other year, allowing plans to evaluate whether they comply with the MHPAEA. The self-compliance tool is the same audit checklist used by investigators in an enforcement action. It includes expanded guidance concerning non-quantitative treatment limitations and disclosure, along with additional examples regarding the scope of the MHPAEA.

The DOL also published a form for participants to request information from group health plans regarding limitations affecting a participant's access to mental health or substance use disorder benefits. This form will be used in claim situations where more information is needed by the participant in order to understand the claims process or why a claim was denied. [The form is available here via the DOL website.](#)

The DOL enforcement fact sheet notes that in 2017 the DOL completed more than 180 investigations on the MHPAEA compliance issues. It found 92 identified violations, the majority of

which were failures to comply with non-quantitative treatment limitations. The report to Congress states explicitly that enforcement of the MHPAEA is one of the DOL's primary enforcement priorities.

Action Items

With the uptick in litigation involving "wilderness therapy," along with the DOL, IRS, and HHS's guidance highlighting the priority of MHPAEA enforcement, it is of the utmost importance that employers, especially those with self-insured plans, review their plans to determine MHPAEA compliance. The self-compliance tool provided by the DOL is the perfect place to start since it includes the same audit checklist used by the agency in its enforcement actions. It would also be a good idea to review the MHPAEA information request form to understand what types of information a plan must provide to participants, a process that will yield further insight into compliance obligations. Importantly, plans and SPDs may need to change language or clarify language to ensure MHPAEA compliance and avoid potential penalties for MHPAEA violations as well as costly litigation over "wilderness therapy" benefits.

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