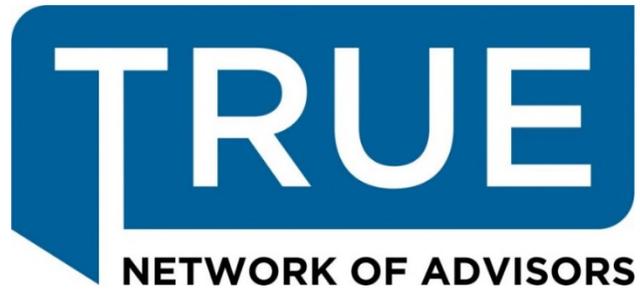


MHPAEA 101 and What's New



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MHPAEA Overview

- ▼ Applies to nearly all group health plans and insurance carriers
- ▼ Group health plans sponsored by employers with at least 51 employees
 - ▼ Small employer exemption for employers with fewer than 51 employees
 - ▼ ACA “*Backdoor*” - Effectively, the exemption does not apply to small employers with fully-insured small group market plans because the ACA’s essential health benefits requirements require such benefits to be provided in compliance with MHPAEA

MHPAEA Overview

- ▼ Requires that **financial requirements and treatment limitations** on mental health or substance use disorder (MH/SUD) benefits are no more restrictive than those on medical or surgical (med/surg) benefits
- ▼ Facilitates access to mental health and addiction treatment by eliminating discriminatory restrictions on mental health or substance use disorder coverage and other barriers placed on treatment
- ▼ Applies to benefits to treat opioid use disorder and helps to protect access to treatment during the opioid crisis and beyond
- ▼ DOL, HHS, and the Treasury (collectively, the Departments) share interpretive jurisdiction over MHPAEA
 - ▼ DOL enforces the law with respect to private employer-sponsored group health plans

Mental Health Parity & Addiction Equity Act

- ▼ **Financial requirements** (such as copays, deductibles, and out-of-pocket maximums) or **quantitative treatment limitations** (such as day or visit limits) applicable to MH/SUD benefits can be no more restrictive than the predominant financial requirements or quantitative treatment limitations applied to substantially all med/surgical benefits covered by the plan
- ▼ Applied within six classifications:
 - ▼ Inpatient, in-network
 - ▼ Outpatient, in-network
 - ▼ Inpatient, out-of-network
 - ▼ Outpatient, out-of-network
 - ▼ Emergency care
 - ▼ Prescription drugs

Mental Health Parity & Addiction Equity Act

- ▼ **Nonquantitative Treatment Limitations (NQTLs)** - In general, NQTLs are limitations on the scope or duration of benefits for treatment (such as medical necessity determinations, preauthorization requirements or fail-first policies). Generally non-numerical.
- ▼ **General rule:** Processes, strategies, evidentiary standards, or other factors used in applying a NQTL to MH/SUD benefits must be comparable to, and applied no more stringently than, those used with respect to med/surgical benefits in the same classification

MHPAEA & CAA Requirements

- ▼ On December 27, 2020, the Consolidated Appropriations Act of 2021 (CAA) amended MHPAEA to require group health plans and health insurance issuers offering group or individual coverage to perform and document their **comparative analyses** of the design and application of NQTLs
- ▼ Beginning 45 days from the date of the enactment of the CAA (February 10, 2020), plans and issuers must make the comparative analyses and certain other information available to the Departments or applicable State authorities upon request
 - ▼ **And to plan participants and beneficiaries upon request (according to the DOL)**
- ▼ DOL Guidance issued on April 2, 2021:
<https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-45.pdf>

MHPAEA & CAA Requirements

- ▼ Plans and issuers must make available, upon request, the comparative analyses and the following information with respect to each plan or coverage:
 - ▼ The specific terms that apply regarding the NQTLs, and a description of all MH/SUD and med/surgical benefits to which each term applies in each respective benefits classification
 - ▼ The factors used to determine that the NQTLs will apply to MH/SUD benefits and med/surgical benefits
 - ▼ The evidentiary standards used for those factors, when applicable, provided that every factor shall be defined, and any other source or evidence relied upon to design and apply the NQTLs to MH/SUD and med/surgical benefits

MHPAEA & CAA Requirements

- ▼ Plans and issuers must make available, upon request, the comparative analyses and the following information with respect to each plan or coverage:
 - ▼ Comparative analyses demonstrating that the processes, strategies, evidentiary standards, and other factors used to apply the NQTLs to MH/SUD benefits are comparable to and no more stringently applied than those for med/surgical benefits, as written AND in operation
 - ▼ The specific findings and conclusions, including any results of the analyses that indicate that the plan or coverage is or is not in compliance with MHPAEA

MHPAEA & CAA Requirements

- ▼ DOL FAQ Guidance doubled down on the requirements and explained that the comparative analysis for each NQTL imposed must include a robust discussion of specified elements:
 - ▼ A clear description of the specific NQTL, plan terms, and policies at issue
 - ▼ Identification of the specific MH/SUD and medical/surgical benefits to which the NQTL applies within each benefit classification, and a clear statement as to which benefits identified are treated as MH/SUD and which are treated as medical/surgical.
 - ▼ Identification of any factors, evidentiary standards or sources, or strategies or processes considered in the design or application of the NQTL and in determining which benefits, including both MH/SUD benefits and medical/surgical benefits, are subject to the NQTL. Analyses should explain whether any factors were given more weight than others and the reason(s) for doing so, including an evaluation of any specific data used in the determination.
 - ▼ To the extent the plan or issuer defines any of the factors, evidentiary standards, strategies, or processes in a quantitative manner, it must include the precise definitions used and any supporting sources.
 - ▼ The analyses, as documented, should explain whether there is any variation in the application of a guideline or standard used by the plan or issuer between MH/SUD and medical/surgical benefits and, if so, describe the process and factors used for establishing that variation.

MHPAEA & CAA Requirements

- ▼ DOL FAQ Guidance doubled down on the requirements and explained that the comparative analysis for each NQTL imposed must include a robust discussion of specified elements (continued):
 - ▼ If the application of the NQTL turns on specific decisions in administration of the benefits, the plan or issuer should identify the nature of the decisions, the decisionmaker(s), the timing of the decisions, and the qualifications of the decisionmaker(s).
 - ▼ If the plan's or issuer's analyses rely upon any experts, the analyses, as documented, should 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 MH/SUD and medical/surgical benefits.
 - ▼ A reasoned discussion of the plan's or issuer's findings and conclusions as to the comparability of the processes, strategies, evidentiary standards, factors, and sources identified above within each affected classification, and their relative stringency, both as applied and as written. This discussion should include citations to any specific evidence considered and any results of analyses indicating that the plan or coverage is or is not in compliance with MHPAEA.
 - ▼ **The date of the analyses and the name, title, and position of the person or persons who performed or participated in the comparative analyses.**

MHPAEA & CAA Requirements

- ▼ Examples of **insufficient** NQTL comparative analysis:
 - ▼ Conclusory or generalized statements, including mere recitations of the legal standard, without specific supporting evidence and detailed explanations
 - ▼ Production of large volume of documents without a clear explanation of their relevance to the comparative analysis
 - ▼ Identification of processes, strategies, sources, and factors without clear and detailed analysis or explanation of how they were defined and applied
 - ▼ Reference to factors and evidentiary standards that were defined or applied in a quantitative manner, without the precise definitions, data, and information necessary to assess their development or application
 - ▼ Analysis that is outdated due to passage of time or change in plan structure

MHPAEA & CAA Requirements: DOL Enforcement

- ▼ CAA 2021 establishes a process for the Departments to request comparative analyses of NQTLs from plans and issuers
- ▼ On request, plans and issuers must make available their comparative analyses that involve potential violations, complaints of noncompliance, and other instances the Departments deem appropriate
- ▼ The Departments will review these analyses to determine whether the plan or issuer has demonstrated compliance with MHPAEA
 - ▼ If the Departments conclude that the plan or issuer has not submitted sufficient information, the Departments will specify the additional information the plan or issuer must provide

MHPAEA & CAA Requirements: DOL Enforcement

- ▼ The Departments will determine whether any impermissible plan provisions or practices were identified
- ▼ If there is an initial finding of noncompliance, the plan or issuer will specify the corrective actions to be taken and provide the Departments additional comparative analyses within 45 days
- ▼ If the Departments make a final determination of noncompliance:
 - ▼ Within 7 days, the plan or issuer must notify all covered individuals of the noncompliance
 - ▼ The Departments must share findings with the state where the plan is located or the issuer is licensed
 - ▼ **The Departments must submit to Congress an annual report on the findings including the identity of each noncompliant plan or issuer**

MHPAEA & CAA Requirements: DOL Enforcement

- ▼ In enforcing the MHPAEA, the DOL indicated that they would focus on the following NQTLs:
 - ▼ Preauthorization 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 allowing health providers to be part of a health plan's network, including reimbursement rates
 - ▼ Out-of-network reimbursement rates (that is, how a plan determines usual, customary, and reasonable (UCR) charges)

MHPAEA & CAA Requirements: **Immediate Steps**

- ▼ **Contact TPAs, claims administrators, insurance carriers**
 - ▼ **Will they provide Comparative Analyses? Assist?**
 - ▼ **Include requirement to provide Comparative Analyses in future agreements**
- ▼ **Obtain all data available vs. request targeted data**
- ▼ **Prioritize DOL's indicated focus areas**
- ▼ **Begin Comparative Analyses Process (find the holes)**
 - ▼ **Involve representative from service providers, if possible**
- ▼ **Document all efforts**

MHPAEA & CAA Requirements

- ▼ In its most recent update of the MHPAEA Self-Compliance Tool, DOL highlighted the following types of documents and relevant information that a plan or issuer should have available:
 - ▼ Records documenting NQTL processes and application to ensure the plan or issuer can demonstrate compliance with the law, including reporting requirements under state law
 - ▼ Any documentation that the plan or issuer has relied upon to determine that the NQTLs apply no more stringently to MH/SUD benefits, including any available details on application, and any internal testing, review, or analysis
 - ▼ Samples of covered and denied MH/SUD and medical/surgical benefit claims
 - ▼ **Documents related to MHPAEA compliance with respect to service providers (if a plan delegates management of MH/SUD benefits to another entity)**

MHPAEA Self-Compliance Tool

- ▼ The MHPAEA Self-Compliance Tool includes a section on NQTLs that outlines a process for conducting comparative analyses of NQTLs that is generally consistent with the requirements of the CAA
 - ▼ *Plans and issuers that have carefully applied the guidance in the Self-Compliance Tool should be in a strong position to comply with the CAA's requirement to submit comparative analyses upon request*

MHPAEA Self-Compliance Tool

Four-Step Parity Analysis of NQTLs

- ▼ Step One: Identify specific plan or coverage terms or other relevant terms regarding NQTLs, and a description of all MH/SUD and med/surg benefits to which each term applies in each benefit classification
- ▼ Step Two: Identify the factors used to determine that the NQTLs will apply to MH/SUD and med/surg benefits.
 - ▼ Examples of factors include, but are not limited to:
 - ▼ Excessive utilization
 - ▼ Recent medical cost escalation
 - ▼ Provider discretion in determining diagnosis

MHPAEA Self-Compliance Tool

- ▼ **Step Three: Identify the sources (including processes, strategies, or evidentiary standards) used to define the factors used to design the NQTLs**
 - ▼ **Examples of sources include, but are not limited to:**
 - ▼ **Internal claims analysis**
 - ▼ **Medical expert reviews**
 - ▼ **National accreditation requirements**
 - ▼ **Published or internal plan or issuer standards relied on to define the factors triggering application of an NQTL to benefits**
- ▼ **Step Four: Perform and maintain analyses demonstrating that the processes, strategies, evidentiary standards, and factors used in designing and applying NQTLs are comparable and no more stringently applied to MH/SUD and med/surg benefits, both as written and in operation**

MHPAEA – Best Practices for Establishing an Internal Compliance Plan

- ▼ **21st Century Cures Act**
 - ▼ **Directs the Departments to include recommendations to advance compliance with MHPAEA, and encourage the development of internal controls**
- ▼ **Section H of the MHPAEA Self-Compliance Tool**
 - ▼ **Addresses best practices for establishing an internal MHPAEA compliance plan to promote the prevention, detection, and resolution of potential MHPAEA violations**
 - ▼ **Provides examples of the types of records that a plan or issuer should be prepared to provide in the event of a DOL investigation**

MHPAEA – Best Practices for Establishing an Internal Compliance Plan

- ▼ **Conduct effective training and education**
 - ▼ Include individuals making decisions on behalf of the plan or issuer
- ▼ **Ensure retention of records and information**
 - ▼ Requirements under ERISA section 107
 - ▼ Comparative analyses that involve potential MHPAEA violations or complaints
- ▼ **Conduct internal monitoring and regular compliance reviews**
 - ▼ Audit samples of adverse benefit determinations
 - ▼ Establish clear protocols in delegating management of benefits to another entity
- ▼ **Respond promptly to detected offenses and develop corrective action plans**
 - ▼ Include retroactive relief and notice to potentially affected participants

MHPAEA & Autism

- ▼ Case law is trending towards prohibiting limitations on autism benefits, including ABA Therapy.
 - ▼ *Doe v. United Behavioral Health* – ND Cal / 9th Circuit
 - ▼ Although the plan covered autism and Autism Spectrum Disorder, it contained exclusions for ABA and IBT
 - ▼ The **claims administrator** argued that the MHPAEA provides that nothing shall be construed as requiring a group health plan to provide any mental health or substance use disorder benefits. Therefore, it does not require the plan to provide specific mental health benefits relating to autism
 - ▼ Holding: *In this case, the ABA and IBT exclusions only apply to mental health disorders. Therefore, the exclusions create a separate treatment limitation applicable only to services for a mental health condition. By doing so, the exclusion violates the plain terms of the MHPAEA.*
- ▼ The DOL has listed treatment limitations regarding autism spectrum disorder as an area of emphasis in its 2021 MHPAEA enforcement strategy



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