



ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES:

PRACTICAL Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, Ken Johnson, Amy Heppner, and Laurie Kirkwood provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley, Carolyn, Ken, Amy, and Laurie are senior members in the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

AGENCIES ISSUE FAR-REACHING RULES RELATING TO MENTAL HEALTH PARITY COMPLIANCE OBLIGATIONS FOR NQTLs

On July 25, 2023, the tri-agencies (Internal Revenue Service, Department of Labor, and Department of Health and Human Services) released new proposed regulations under the Mental Health Parity and Addiction Equity Act (MHPAEA) that, if finalized, would provide significant clarifications and new compliance obligations for group health plans and issuers subject to the MHPAEA's provisions. These rules are part of a Biden Administration push to improve access to in-network mental health care. Comments on the proposed rule will be due 60 days after publication in the Federal Register.

In addition to the Proposed Rules, the agencies released the second report to Congress on the MHPAEA comparative analysis for nonquantitative treatment limitations. This report for the first time, as required by the Consolidated Appropriations Act, 2021, names specific plans that were found by the agencies to not be compliant with the comparative analysis requirement.

BACKGROUND

Under current law, group health plans and health insurance issuers subject to the MHPAEA must comply with detailed compliance obligations for both quantitative treatment limitations (QTLs) and nonquantitative treatment limitations (NQTLs) that impact mental health and substance abuse disorder (MH/SUD) benefits.

While guidance for the QTL obligations (such as monetary caps or limitations on the number of days of treatment) has been in place for some time, significant recent agency attention and guidance has addressed NQTL obligations (such as provider contracting, network



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requirements, and utilization review). The Proposed Rules expand and clarify the NQTL requirements.

WHEN ARE THE NEW REQUIREMENTS EFFECTIVE?

If finalized as proposed, the new requirements would be generally effective starting the first plan year starting on or after January 1, 2025. However, certain clarifications of existing rules are currently effective.

WHAT ARE THE MAJOR PROPOSED RULE CHANGES FOR NQTLs?

Upon initial review, notable provisions include the following:

- **Application of substantially all/ predominant test to NQTLs.** The Proposed Rules require that the “substantially all/ predominant” test currently applicable to QTLs also apply to NQTLs. This means that for an MH/SUD NQTL to be permissible, it must apply to at least two-thirds of the medical benefits in the same classification (i.e., inpatient, in-network;

inpatient, out-of-network; outpatient, in-network; outpatient, out-of-network; emergency care; and prescription drugs). In addition, only the predominant (most frequent) variation of the NQTL can apply. This will likely significantly limit the issuer’s or plan’s ability to apply certain NQTLs, such as clinical utilization review techniques, to MH/SUD benefits.

- **Meaningful benefit requirement.** Under the Proposed Rules, if a plan provides any benefits for an MH/SUD condition in any classification of benefits, meaningful benefits for that MH/SUD condition must be provided in every classification in which medical/surgical benefits are provided, as determined in comparison to the benefits provided for medical/surgical conditions in the classification.
- **Design and application requirement.** Under the Proposed Rules, NQTLs are subject to a new “design and application” requirement under which the NQTL analysis will also apply “in designing and applying the limitation.”
- **Data gathering requirement as part of the NQTL process.** There is a specific data collection requirement for network composition that “includes, but is not limited to, in-network and out-of-network utilization rates (including data related to provider claim submissions), network adequacy metrics (including time and distance data, and data on providers accepting new patients), and provider reimbursement rates (including as compared to billed charges).”



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The [Technical Release](#) issued at the same time as the Proposed Rules provides technical details, includes a request for information concerning this data gathering, and discusses a possible safe harbor on network composition based on this data gathering.

- For NQTLs other than network composition, a “material difference” in the metrics/data gathering for the NQTL as applied to MH/SUD and medical/surgical benefits would be a “strong indicator” of a violation, and the Proposed Rule details action that should be taken.
- As to network composition, the Proposed Rule goes beyond a “strong indicator” and provides that there would be an NQTL violation if “the relevant data show material differences in access to in-network mental health and substance use disorder benefits as compared to in-network medical/surgical benefits in a classification.”

- **Further clarification on comparative analysis demonstrations.** The Proposed Rules contain further detail on the contents of an NQTL comparative analysis and the timing to respond to a request for a comparative analysis from one of the agencies.

We will expand our analysis of these far-reaching rules in a forthcoming article. ■



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