

Blog Post

Biden Administration Signals MHPAEA Enforcement a Priority with Fiscal 2023 Budget

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The Biden Administration's proposed budget for fiscal year 2023 serves as a warning to all plan issuers and administrators that enforcement of the Mental Health Parity and Addiction Equity Act (MHPAEA) is a top priority for the federal government. The proposed budget reflects a substantial and sustained commitment to ramp up enforcement efforts, with specific funding for MHPAEA audit activity, including \$275 million for the Department of Labor over a 10-year period and \$125 million for state grants to support their MHPAEA enforcement efforts. The Biden Administration has also proposed that Congress: (1) grant the Department of Labor (DOL) the ability to pursue civil monetary penalties against entities that provide administrative services to group health plans and do not comply with the MHPAEA; and (2) amend ERISA to allow participants and beneficiaries to recover losses due to parity violations through private rights of action. Plan issuers and administrators should take heed of these developments to get ahead of enforcement efforts and review their procedures, documents, and activities to ensure they meet the government's stringent requirements.

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Background

The MHPAEA requires group health plans that offer mental health and substance use disorder (MH/SUD) benefits to provide them in parity with medical/surgical benefits. The MHPAEA provides that group health plans cannot impose financial requirements (such as deductibles and copayments) and treatment limitations (such as limits on the number of visits) on MH/SUD benefits that are more restrictive than the predominant financial requirements and treatment limitations applicable to substantially all medical/surgical benefits in a particular classification. In addition, plans cannot apply nonquantitative treatment limitations (NQTLs) to MH/SUD benefits unless those same NQTLs are also equally applied to medical/surgical benefits. Examples of NQTLs include preauthorization requirements, concurrent review requirements; and treatment plan requirements.

The MHPAEA final regulations require the processes, strategies, evidentiary standards, and other factors used in designing and applying any NQTLs applicable to MH/SUD, both as written and as applied in operation, be comparable to, and applied no more stringently than the processes, strategies, evidentiary standards, and other factors used to apply the same NQTLs to medical/surgical benefits in the same classification. In 2021, the Consolidated Appropriations Act 2021 (CAA) imposed additional requirements that group health plans perform and document in writing their comparative analyses of the design and application of NQTLs.

Announced Enforcement Priorities Require Industry Preparatory Investment

One of the practical challenges for insurance companies and third-party administrators in developing and implementing a cohesive MHPAEA approach to plan design, administration, recordkeeping, and audit response support is the reality that multiple federal agencies – each with its own priorities, budgets, and approaches – are jointly tasked with enforcement duties. Specifically,

MHPAEA compliance for ERISA-covered plans is administered by the DOL; for non-federal governmental plans, the Centers for Medicare & Medicaid Services (CMS), which is part of the Department of Health and Human Services (HHS), administers compliance; and for group health plans, the Department of Treasury also has enforcement authority. ERISA, the Public Health Service Act, and the Internal Revenue Code also require plans and issuers (as applicable) to make available to DOL, HHS or Treasury, upon request, the comparative analyses and supporting information demonstrating compliance with MHPAEA's requirements.

Concerning Early Signs

The tri-agencies reported on their MHPAEA enforcement efforts to Congress in late January 2022. Some key takeaways from the report emphasize the urgency for plans and administrators to take stock of their approaches *before* getting any inquiries from the government. The first takeaway is that the agencies have been very active in requesting and reviewing the comparative analyses of NQTLs. The DOL's Employee Benefits Security Administration (EBSA) has, thus far, issued 156 letters to plans and issuers requesting comparative analyses for 216 unique NQTLs across 86 investigations. The Centers for Medicare and Medicaid Services (CMS) issued 15 letters between May and November 2021 to insurance carriers in states where CMS has direct MHPAEA enforcement authority (Texas, Missouri, and Wyoming) and to non-federal governmental plan sponsors in those and other states.

The second key takeaway is that none of the comparative analyses reviewed to date contained sufficient information upon initial receipt. The DOL's Employee Benefits Security Administration observed several common themes in deficiencies:

- Failure to document comparative analysis before designing and applying the NQTL;

- Conclusory assertions lacking specific supporting evidence or detailed explanation;
- Lack of meaningful comparison or meaningful analysis;
- Non-responsive comparative analysis;
- Documents provided without adequate explanation;
- Failure to identify the specific MH/SUD and medical/surgical benefits or MHPAEA benefit classification/s affected by an NQTL;
- Limiting scope of analysis to only a portion of the NQTL at issue;
- Failure to identify all factors;
- Lack of sufficient detail about identified factors;
- Failure to demonstrate the application of identified factors in the design of an NQTL; and
- Failure to demonstrate compliance of an NQTL as applied.

The written comparative analyses of NQTLs are required by statute, and in the context of its audits, the government is demanding production of them in short timeframes. There is not sufficient time to prepare these analyses after receipt of an information request. As a result, it is critical for carriers, plan sponsors, and their service providers to prepare the comparative analyses and supporting documentation now – before the government comes knocking.

In light of both recent enforcement efforts and anticipated future compliance campaigns, it is sensible to invest in demonstrating MHPAEA compliance and to build systems and baseline documentation and processes to respond in a timely and fulsome way to the inevitable audit activity plans and administrators will face.

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