



Insurance Brokers &
Consultants

EPIC 2023 Compliance Series

Mental Health Parity
and Other Updates
9/21/2023

[EPICBROKERS.COM](https://www.epicbrokers.com)

Presenters



Liz Mann, EPIC Director of Compliance

Liz Mann is EPIC's Internal Compliance Director. Liz and her team are responsible for disseminating information to clients about changing requirements and regulations and reviewing all plan designs and programs for compliance with Federal and State regulations. Liz is embedded into our account management team to provide timely support and guidance as ERISA-related regulations or concerns emerge in the marketplace. As a client, you have the option of directly accessing Liz or accessing her traditionally through your account team. Liz graduated Magna Cum Laude from Saint Mary's College in Notre Dame, IN with Bachelor of Arts degrees in History and French. She graduated with her law degree from University of Toledo, College of Law in Toledo Ohio in 2007. She has accumulated over 14 years of experience working in employee benefits and offers expertise in ERISA, IRS, COBRA, FMLA and ACA compliance.



Andreena Norfleet, EPIC Compliance Consultant

Andreena Norfleet is EPIC's Internal Compliance Consultant. Andreena assists clients by providing updates with the latest news from State and Federal regulators as well as reviewing plan designs for compliance. Andreena Norfleet is a double Panther - graduating magna cum laude from Georgia State University with a Bachelor of Arts degree and in 2022, she obtained her law degree from Georgia State University College of Law. Prior to law school, Andreena managed a private urgent care clinic with 3 locations across the metro-Atlanta area, overseeing the company's compliance and revenue-cycle management departments.

Agenda

Mental Health Parity – New Proposed Guidance & Congressional Report

New and Upcoming

- Affordability Changing for 2024
- ERISA PBM law preemption
- Long Term Care – States to Watch
- Reminder – Medicare Part D Notices

Questions?

A large, white, stylized number '1' is centered within a dark blue rounded square.

Mental Health Parity

New Proposed Guidance & Congressional Report

Mental Health Parity Addiction Equity Act

Background & Timeline

- 1996 – Mental Health Parity Act
- 2008 - Mental Health Parity and Addiction Equity Act (MHPAEA)
- 2013 – Final MHPAEA rules under Affordable Care Act (ACA)
- 2020 – Additional requirements under the Consolidated Appropriations Act (CAA)
- 2023 – Proposed rulemaking released

Original Intent

To ensure that individuals have access to mental health and substance use disorder (MH/SUD) treatment in the same capacity as individuals seeking treatment for medical/surgical (M/S) procedures.

Context for the New Proposed Rule

Biden Administration increased efforts to improve access to mental health care

Mental Health Parity Addiction Equity Act (2013)

Quantitative Treatment Limitations (QTLs)

Plans cannot impose a financial requirement (such as copays, coinsurance, deductible) or a treatment limitation on MH/SUD benefits that are more restrictive than the financial requirements or treatment limitations that apply to substantially all M/S benefits in the same classification. This evaluation requires actuarial assumptions, based upon expected costs.

Non-Quantitative Treatment Limitations (NQTLs)

Plans cannot impose benefit limits on MH/SUD benefits that are not a specific monetary or visit limitation (such as preauthorization, fail-first/step therapy protocols, probability of improvement evidence, requirements of written treatment plans, residential treatment limits, geographical limitations, and licensure requirements for providers) that are more restrictive than those imposed on M/S benefits in the same classification.

Mental Health Parity NQTL Comparative Analysis (2021)

Current Requirements

Starting February 10, 2021, as part of the Consolidated Appropriations Act (CAA) group health plans that provide coverage for MH/SUD benefits are required to prepare a **comparative analysis** of the plan's NQTLs.

- The analysis must be provided upon request
 - Plan sponsors are encouraged to get a comparative analysis in place **before** the Departments request it
 - The Agencies only give about two weeks to provide the analysis
- Plans must correct any violations within a specific time frame
- Most carriers will provide the completed analysis for fully insured plans, but self-funded TPAs and service providers will only provide the data required to complete the analysis, not the analysis itself

Mental Health Parity NQTL Congressional Reports

Under the CAA, the DOL must provide an annual report to Congress on the status of the NQTL analyses

- Departments performed about 200 audits in 2021 and about 180 audits in 2022
- All analyses were found to be insufficient

Common Deficiencies Found in 2022 and 2023 Reports

- Lack of meaningful analysis and comparison
- Lack of supporting evidence and explanation
- Failure to identify factors used in the design of an NQTL
- Failure to identify specific benefits or benefit classifications affected by an NQTL
- Failure to explain how an NQTL was applied in operation
- Failure to describe processes and evaluate differences in application between MH/SUD and M/S benefits in detail
- Lack of data to demonstrate the application of the NQTL in operation
- Failure to explain differences in access to MH/SUD and M/S benefits in detail

Mental Health Parity NQTL Congressional Reports

Under the CAA, the DOL must provide an annual report to Congress on the status of the NQTL analyses

- DOL Enforcement Priorities
 - Prior authorization
 - Concurrent care review
 - Provider admission standards
 - Out-of-network reimbursement rates
 - Exclusions of key treatments*
 - Provider network adequacy standards*

*new in the 2023 Report to Congress

Mental Health Parity NQTL Proposed Rules (2023)

Proposed Three Part Test for NQTLs

1. No more restrictive
2. Design and Application
3. Relevant Data Evaluation

Material differences in outcomes data is a strong indicator of an NQTL violation

New Proposed Definitions

- Mental health benefits
- Factors
- Processes
- Strategies
- Evidentiary standards

Mental Health Parity NQTL Proposed Rules (2023)

Network Standards

The proposed rules include a special provision for NQTLs related to network composition. A plan or issuer will fail to meet the parity requirements of MHPAEA if, in operation, the relevant data collected shows material differences in access to in-network MH/SUD benefits as compared to in-network M/S benefits in a classification.

The Departments will evaluate the impact of all NQTLs related to network composition based on four types of data:

- Out-of-network utilization
- Percentage of in-network providers actively submitting claims
- Time and distance standards
- Reimbursement rates

Material differences in network composition would prove an actual NQTL violation

Mental Health Parity NQTL Proposed Rules (2023)

Potential Network Standards Safe Harbor

The proposed rules indicate that the Departments may implement a “network standards safe harbor” that includes a variety of metrics taking all four data elements into account.

- Plans that pass the safe harbor would avoid enforcement action
- It is expected that the safe harbor threshold would be high

Mental Health Parity NQTL Proposed Rules for Comparative Analysis (2023)

Comparative Analysis Elements

1. Description of the NQTLs
2. Identification and definition of the factors used to design or apply the NQTL
3. Use of the factors used to design or apply the NQTL
4. Determination of comparability as written
5. Determination of comparability in operation
6. Findings and conclusions

Additional Requirements

- Must be certified by one or more named plan fiduciaries
- Must be available upon request
- Not required to be prepared annually but should be updated for changes in plan design or usage

Mental Health Parity NQTL Comparative Analysis

Proposed Penalties & Consequences for Non-Compliance

- Analysis must be provided to participants/beneficiaries within 30 days of a written request, or an ERISA plan could face up to a \$110 per day penalty
- May be prohibited from imposing certain requirements or limitations prospectively
- May be required to re-process claims retroactively
- May have to send notice to participants and be listed in an enforcement report to Congress

Mental Health Parity NQTL Comparative Analysis

Next Steps for Employers

- Work with your EPIC account team to make sure you have an NQTL comparative analysis in place
- Review service agreements for provisions that outline vendors' responsibility to provide analyses
- Once you have an analysis, review it with EPIC and your TPA/Carrier/Service Providers
- Fix any potential parity issues
- Document any variations in NQTLs and provide rationale for these items

A large white number '2' centered within a dark blue rounded square.

What's New?

New Guidance and Items to Watch

2024 ACA Affordability

Changes to Affordability Percentage

- 2023 – 9.12%
- 2024 – 8.39%

Three IRS Safe Harbors

- Federal Poverty Level
- Rate-of-Pay
- W-2

PBM Transparency – State Legislation

ERISA Preemption

- 2020 – *Rutledge v. PCMA*
 - Supreme Court holds that ERISA does not preempt Arkansas PBM law
- 2023 – *PCMA v. Mulready*
 - 10th Circuit holds that ERISA preempts Oklahoma PBM Law

Since *Rutledge* more than 100 bills have been introduced in state legislatures

Long Term Care

Washington Cares Act

- First state to pass LTC legislation
- Starting July 1, 2023, 0.58% payroll tax with no wage cap to fund the Washington Cares fund
- Starting in 2026 employees can use benefits
- Lifetime maximum \$36,500
- Limited exemptions allowed

State LTC Legislation Status as of August 10, 2023



- **California** – LTC Task Force established in 2019. Feasibility Report completed in 2022. The Actuarial Study draft is due by September 1, 2023, with the final due by January 1, 2024

Legislation has not yet been introduced



- **Minnesota** – Legislation was first introduced in 2021 – no action. In March 2023, the contract was awarded to FTI Consulting to partner with Altarum to conduct a study of options to increase access to long-term care financing, services and support in MN. The Minnesota Department of Human Services (DHS) could begin drafting legislation for 2024



- **Pennsylvania** – House Bill 844 was introduced on April 10, 2023, by a Democratic representative. Would establish a fund similar to the WA Cares Fund. Would allow exemption for private LTC coverage. Bill was assigned to Assembly Human Services Committee. May be difficult to get passed with a divided state senate



- **New York** – Bill introduced in May 2022. The original bill allowed for exemptions for individuals with private LTC coverage (hybrid life/LTC products would not be eligible). Bill must be reintroduced in 2023 as the proposed legislation does not carry over



- **Connecticut** – March 8, 2023, bill referred to Office of Legislative Research and Office of Fiscal Analysis. Study to be presented to General Assembly on July 1, 2024



- **Massachusetts** – House Bill 652 was introduced which would create a special commission and make recommendations to establish a statewide long-term care insurance program. Funds approved by the Senate (not in the House's budget) for an actuarial study to review programs and financing options



- **Colorado** – Commission on Aging met June 14, 2023 – presentations from representatives from WA Cares and the CA LTC task force received a positive reaction

Medicare Part D Creditable Coverage

Creditable Coverage Rule

Plan participants must maintain “creditable” coverage under an employer sponsored health plan or risk penalties when enrolling in Medicare Part D prescription drug coverage.

Notice Requirement

Employers must provide notice of creditable or non-creditable coverage to Medicare eligible individuals at certain points throughout the year

- When must the notice be distributed?
- Who should receive the notice?
- How should the notice be distributed?

3

Questions?