crowell moring

CLIENT ALERT

COVID Relief and Appropriations Legislation Includes Mental Health Parity Compliance and Oversight Requirements

Dec.23.2020

Congress added additional compliance and oversight requirements focused on nonquantitative treatment limitations ("NQTLs") in Division BB, Title II, Section 203 of the Consolidated Appropriations Act, 2021. The law formalizes the four-step NQTL compliance analysis outlined in sub-regulatory guidance, obligates health plans and health insurance issuers ("plans/issuers") to make the compliance analysis available to state regulators, DOL, or HHS upon request, and charges DOL and HHS with conducting at least 20 reviews of such analysis each year. And the law directs the federal government to finalize interim guidance and regulations and update compliance guidance with de-identified, real-world examples of compliant and non-compliant NQTLs with sufficient detail to show whether the processes, factors, or other criteria hit or missed the mark.

These changes build on the 21st Century Cures Act's compliance guidance enhancements to mental health parity in 2016. The opioid epidemic and COVID-19 pandemic underscore growing attention of regulators, consumers, and health care industry participants to mental health and substance use issues, and the increased focus on mental health parity compliance.

Under the new legislation, beginning 45 days from the date of enactment, health insurance issuers and health plans must make available upon request to state regulators, DOL, or HHS (as applicable):

- The specific plan or coverage terms regarding the NQTLs and the medical/surgical ("med/surg") and mental health/substance use disorder ("MH/SUD") benefits to which the terms and NQTLs apply;
- The factors used to determine that the NQTLs apply to med/surg or MH/SUD benefits;
- The evidentiary standards used to evaluate the factors and any other source or evidence relied upon to design and apply the NQTLs to med/surg or MH/SUD benefits;
- The comparative analysis demonstrating that the processes, strategies, evidentiary standards, and other factors used to apply the NQTL to MH/SUD benefits are comparable to and no more stringent than those used to apply it to med/surg benefits; and
- The specific findings and conclusions by the plan/issuer about whether it is or is not in compliance.

These terms formalize in statute the general analytical framework for NQTLs previously recommended in sub-regulatory guidance.

The legislation directs HHS and DOL to request submission of the comparative analysis from plans/issuers that involve potential violations or complaints about NQTL compliance, or as otherwise determined to be appropriate. It also requires HHS and DOL to examine at least 20 such analyses. Compliance guidance must provide the timeline and process for potential and current plan participants, enrollees, authorized representatives, and health care providers to file complaints about alleged non-compliance, including the relevant state, regional, or national offices for such complaints.

When HHS or DOL examine a plan/issuer's comparative analysis, the government may determine that it has insufficient information and may request more specific data for review to assess compliance. The statutes makes clear, however, that just because the government reviews a plan/issuer's comparative analysis does not mean that the plan/issuer is parity compliant.

If the federal government determines a plan/issuer is not in compliance, the plan/issuer must explain how it will become compliant and provide comparative analysis demonstrating compliance within 45 days after the initial determination – a very short turnaround time. If the federal government makes a final determination that a plan/issuer remains out of compliance, then the federal government must notify all enrollees that the plan/issuer is not compliant within 7 days of the final determination.

Medicaid managed care organizations and CHIP plans generally receive a pass on the new compliance requirements. Section 203 provides that, as long as a plan complies with the applicable parity requirements of CMS's Medicaid managed care and CHIP regulations (in Parts 438, 440, and 457 of Title 42 of the C.F.R.), the plan need not comply with the new requirements for NQTL analyses and HHS information requests.

HHS and DOL must report to Congress identifying, among other things, the plans/issuers examined, whether the plans/issuers provided sufficient information, and whether they were in compliance. The legislation also directs the DOL, HHS, and Treasury Offices of Inspectors General to enter an interagency agreement to share findings of compliance and non-compliance and seek agreements to share those findings with states.

The legislation transforms recommended compliance practices into statutory obligations, increases federal oversight, and creates significant investigation and litigation risk for health plans and issuers. For more information or assistance with mental health parity compliance, investigations, and litigation, please contact us.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

A. Xavier Baker
Partner – Washington, D.C.
Phone: +1 202.624.2842
Email: xbaker@crowell.com

Michael W. Lieberman
Partner – Washington, D.C.
Phone: +1 202.624.2776
Email: mlieberman@crowell.com

Lauren R. Nunez
Counsel – Washington, D.C.
Phone: +1 202.624.2559
Email: lnunez@crowell.com

Joe Records
Counsel – Washington, D.C.
Phone: +1 202.624.2709

Email: jrecords@crowell.com