

# THE DEEP DIVE

Exclusive Compliance Insights from MZQ Consulting

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## CAA DEEP DIVE SERIES: MENTAL HEALTH PARITY COMPLIANCE

While much of [the Consolidated Appropriations Act of 2021](#) addresses issues directly related to the COVID-19 pandemic, the law also contains many sections covering other health policy issues. One of these is Title II, Section 203. It aims to improve compliance with the non-quantitative treatment limitation requirements outlined in the [Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 \(MHPAEA\)](#).

This part of the new law requires group health plans and individual and group health insurance carriers to perform and document comparative analyses of how every plan design they offer applies non-quantitative treatment limitations for mental health and substance use disorders. All applicable plans will need to be prepared to make this and other parity compliance information available to the federal Departments of Health and Human Services (HHS) and Labor (DOL) upon request.

### What in the World Are the MHPAEA Non-Quantitative Treatment Limitation Requirements?

The goal of the MHPAEA is to make sure that health plans cover mental health and substance use disorders (MH/SUD) fairly. The law and its related regulations require all applicable plans to ensure that any plan financial requirements and coverage terms related to MH/SUDs are no more restrictive than the requirements related to substantially all medical/surgical services in the same benefit category.

Part of verifying parity is making sure that coverage conditions for MH/SUD benefits aren't harder to meet than they are for other plan services. There are two types of conditions that plans have to look out for—quantitative treatment limits (QTLs) and non-quantitative treatment limits (NQTLs).

QTLs are numbers-based and include things like cost-sharing requirements and treatment limits that can be counted (such as a limit on the number of covered visits to a specific kind of provider). NQTLs are all of the treatment limitations that cannot be tabulated, such as pre-authorization requirements, provider network limitations, formulary design, and medical necessity standards. Plans can't apply

NQTLs for MH/SUD differently or more stringently than the NQTLs applied to medical/surgical benefits in the same classification. For example, if a health plan doesn't require a care plan before approving an inpatient hospital stay for a hip replacement, it cannot require a care plan before an inpatient psychiatric stay.

NQTL standards can be subjective and tough to measure. Also, not all NQTLs are appropriate for all types of covered services. Since analyzing NQTLs is so difficult, many entities subject to the MHPAEA and its related rules glossed over this part of the law in the past, unless they were forced to deal with it. Now, the CAA requires all employer group plan sponsors and all private health insurance carriers to take NQTL compliance seriously.

### **What Does the CAA Require Plans to Do Exactly?**

The CAA requires all group health plan sponsors and all health insurance issuers offering group and individual coverage to conduct a comprehensive analysis of each of their specific plan's NQTLs. This written analysis must include the following items for each plan offered:

- The specific plan or coverage terms or other relevant terms regarding the NQTLs.
- A description of all mental health or substance use disorder and medical or surgical benefits in each respective benefits classification.
- The factors used to determine that the NQTLs will apply to mental health or substance use disorder benefits and medical or surgical benefits, and every factor shall be defined.
- The standards used for the factors identified when applicable, and any other source or evidence relied upon to design and apply the NQTLs to mental health or substance use disorder benefits and medical or surgical benefits.
- The comparative analyses demonstrating that the processes, strategies, evidentiary standards, and other factors used to apply the NQTLs to mental health or substance use disorder benefits, as written and in operation, are comparable to, and are applied no more stringently than, the processes, strategies, evidentiary standards, and other factors used to apply the NQTLs to medical or surgical benefits in the benefits classification.
- The specific findings and conclusions reached by the group health plan or health insurance issuer with respect to the health insurance coverage, including any results of the analyses described in this subparagraph that indicate that the plan or coverage is or is not in compliance with this section.

Group health plans and individual and group health insurers must prepare these analyses as soon as possible. Technically, this requirement became effective February 10, 2021 however, due to the tight timeline and lack of regulations, the vast majority of health plans are still working towards full compliance.

### **Why Will the Federal Government Request Copies of My Plan's MHPAEA NQTL Analysis and What Happens When They Do?**

If a group health plan sponsor or health insurance issuer gets a request to send the federal government their NQTL comparative analyses, they will need to do so within the time-frame the federal departments specify. If the information provided is insufficient for the federal government to judge compliance, a request for more information will follow.

Once the information provided is reviewed, if the DOL or HHS concludes that the issuer or group health plan is out-of-compliance, then the plan sponsor or issuer will have 45 days to fix their mistakes and provide a new comparative analysis. If the federal departments review the new documentation and conclude that there are still compliance violations, within seven days of that determination, the federal government will notify all affected plan participants of the plan's noncompliant status. In addition, the federal government will notify all relevant state regulators.

The CAA requires that the DOL request a copy of a plan's MHPAEA NQTL analysis when they suspect a parity violation, when a plan participant complains, or for any other reason they deem necessary. This is essentially the same criteria that the DOL uses now to trigger a group health plan audit. So, while the CAA does not specifically address DOL audits, it stands to reason that MHPAEA NQTL analyses will become an audit component moving forward. Since the CAA requirements apply to a greater scope of entities than are covered by DOL health plan audit requirements, we can also expect these federal compliance checks to occur even more frequently.

To make sure that the federal agencies enforce this section of the CAA, the new law specifically requires the DOL and HSS to request at least 20 plans per year to provide them with NQTL compliance documentation. In addition, by February 10, 2022, and every year thereafter, the DOL and HHS must provide Congress with a publicly available report summarizing their enforcement actions in the prior year.

## **Which Health Plans Need to Comply with the New CAA Requirements?**

The CAA is very clear that this new compliance requirement applies to all group health plan sponsors and individual and group health insurers that are subject to the MHPAEA. The MHPAEA applies to employers with more than 50 employees who offer group health coverage (including group Medicare Advantage coverage) and any related health insurance carriers. Self-funded health plans do not technically have to cover MH/SUDs. However, if they do, then MHPAEA applies. Fully-insured plan must cover mental health benefits in order to comply with Affordable Care Act essential health benefit rule. So, all of these entities need to start performing NQTL parity analyses on their plan offerings as soon as possible!

## **Who Is Responsible for Performing the NQTL Analyses?**

When it comes to individual health insurance offerings, the health insurance carrier is the entity responsible for performing NQTL analyses on all health plan options that they offer. For groups, if the coverage is fully-insured, both the health insurance issuer and the employer plan sponsor have compliance liability. The health insurance carrier is the entity with the data in-hand to perform the analyses, but both parties need to have the documentation at-the-ready. So, businesses that offer fully-insured medical coverage to employees need to check with their health insurance carrier annually to make sure their plans are compliant and request a copy of the NQTL analyses for all coverage options offered.

Compliance is more challenging for sponsors of self-funded group plans subject to the MHPAEA and its related rules. There is no health insurance carrier to help with the required analysis. While the plan's third-party administrator (TPA) and other vendors may assist with the analysis, ultimately the business sponsoring the group plan (i.e., the employer) is the one with fiduciary and compliance responsibility concerning parity compliance. As such, employers that offer self-funded or level-funded health insurance coverage to their employees should reach out to their TPA or administrative service organization right away to determine how they will complete the required NQTL analyses and ensure their plan meets MHPAEA standards.

## What Happens to Plans and Insurers That Do Not Comply with the MHPAEA?

A finding of MHPAEA noncompliance is a serious issue for employer plan sponsors and individual and group health insurance issuers alike. Generally, when federal and state regulators learn that a group plan or issuer is out-of-compliance, they will require the entity to retroactively apply compliant plan rules, review previously denied claims, make appropriate repayments if necessary, and allow enrollees to file retroactive claims. In addition, there can be financial penalties. For employers, these fines may be as high as \$100 per member per day of noncompliance.

Another compliance consideration for health insurance issuers and third-party administrators to think about is how the new MHPAEA compliance enforcement process will affect all plans they service. According to the DOL, when it comes to parity enforcement, they like to practice “global correction.” This means that when they find one group health plan out of compliance, they will approach the group’s service providers (such as third-party administrators, health insurance carriers, and managed behavioral health organizations) to find other non-compliant plans in the vendor’s scope.

## Is There Any Help Available?

MHPAEA compliance is very difficult and determining if a plan fairly applies NQTL requirements is perhaps the trickiest part. Fortunately, in addition to engaging with a compliance vendor to help analyze your plan, there are some existing federal compliance resources available. Plus, the law directs HHS and DOL to develop more resources for insurers and plan sponsors over the next 18 months.

The DOL, which is in charge of MHPAEA enforcement for group health plans, has a self-compliance assessment tool for employer group plans. This tool includes many NQTL compliance examples and red flags for plan sponsors, carriers and third-party administrators to review, and is required to be updated by the DOL at least every two years. The DOL also maintains a parity website, which includes links to all federal guidance, FAQs, and the model disclosure form. The Centers for Medicare and Medicaid Services (CMS) also makes some helpful information available.

Another resource for employer plan sponsors is an older MHPAEA compliance requirement. According to existing rules, all group plans need to be ready to disclose details about QTL and NQTL procedures to any plan participant that requests that information within 30 days. The DOL has a model form for employees to use to request this information. While the disclosure form is intended

for employees to help them request the "right" information, plan sponsors can also use it in reverse as part of the comparative analysis process.

In addition, some states, like Pennsylvania and California, have resources online for health insurance issuers to use when it comes to ensuring parity compliance. Insurance department consumer hotlines also are available for any groups with fully-insured coverage that might have questions about their particular plan. The National Association of Insurance Commissioners is also building a parity tool for issuers and employers which could help with NQTL compliance.

### **Rules to be Developed and Questions That Loom**

The CAA requires the DOL and HHS to prepare rules and sub-regulatory guidance to help implement this section of the law within the next 18 months. These rules and guidance must include updated compliance resources for employers and insurers, including examples and methodologies for them to use to guide their analyses. They also need to create procedures for plan participants and others to alert the federal government about potential parity violations.

MZQ Consulting will continue to monitor developments as new parity compliance rules and guidance are proposed and finalized. As soon as any additional information is released, we will break it down for you!

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