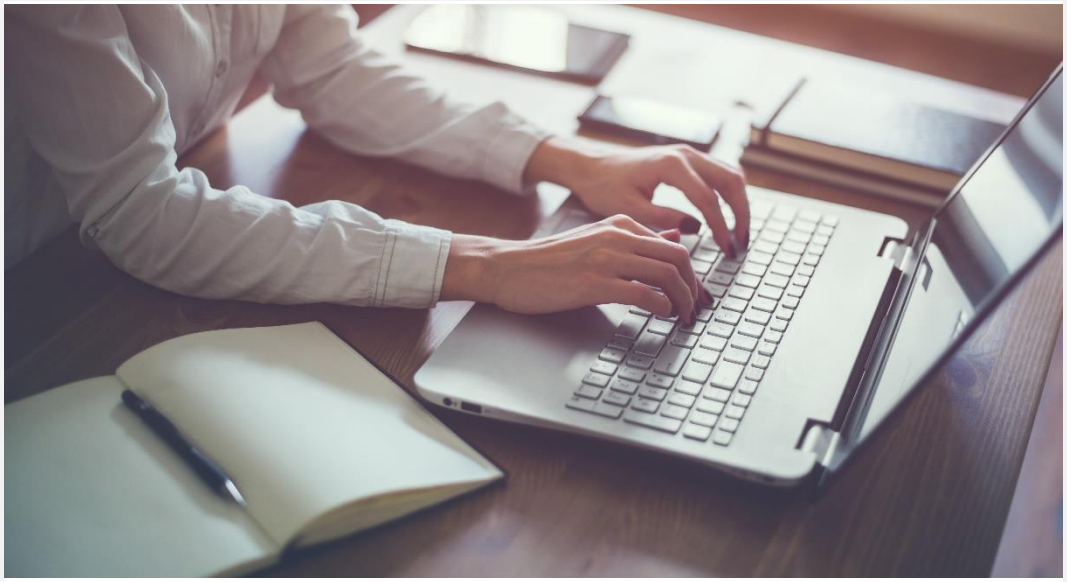
Deloitte.

United States | Human Capital | 18 October 2024

Rewards Policy Insider
2024-21



In this Issue:

What Employers Need to Know About the Final Mental Health Parity Rules – Part 1

As reported in RPI 2024-19, the Departments of Health and Human Services, Labor, and Treasury ("Departments") have issued updated final regulations under the Mental Health Parity and Addiction Equity Act ("MHPAEA") that will start taking effect for plan years beginning on and after January 1, 2025. This is the first in a series of articles designed to take a closer look at the final regulations, and especially at what employers need to know in order to comply. The core questions addressed in this article are: What is a nonquantitative treatment limitation ("NQTL"), and why does it matter?

What are NQTLs?

The general rule is that a group health plan that offers mental health or substance use disorder benefits may not impose any aggregate lifetime or annual dollar limits, financial requirements, or treatment limitations that are more restrictive than the predominant dollar limits, financial requirements, or treatment limitations that are applied to substantially all medical/surgical benefits in the same classification (e.g., prescription drugs, inpatient in-network, inpatient out-of-network, emergency care, etc.).

There are two types of treatment limitations: quantitative treatment limitations and NQTLs. Quantitative treatment limits are expressed numerically, such as 50 outpatient visits per year or 20 outpatient visits per episode, etc. NQTLs, by comparison, are other plan features that "otherwise limit the scope or duration of benefits for treatment under a plan or coverage." The typical example is medical management techniques, such as prior authorization requirements. Other examples specified in the final regulations include:

- Formulary design for prescription drug benefits;
- Network tier design;
- Standards related to network composition, including standards for admitting practitioners to the network;
- Plan methods for determining out-of-network rates;
- Fail-first policies and step-therapy protocols;
- Exclusions based on failing to complete a course of treatment; and
- Restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of covered services.

Why Does it Matter?

The list above is not exhaustive or exclusive. Any plan feature that operates to limit the scope or duration of covered benefits is an NQTL, and must be compliant with the mental health parity rules. Thus, an essential first step is to identify all NQTL's applicable to mental health and substance use disorder benefits.

Once all of a plan's NQTLs applicable to mental health and substance use disorder benefits have been identified, the plan must prepare a comparative analysis of each to demonstrate compliance. Each comparative analysis must include the following information:

- A description of the NQTL, which must among other things identify each mental health or substance use disorder benefits and medical and surgical benefits to which the NQTL applies;
- The factors and evidentiary standards used to design or apply the NQTL;
- A description of how each factor is used in the design and application of the NQTL;
- A demonstration that the NQTL complies with mental health parity *as written*;
- A demonstration that the NQTL complies with mental health parity *in operation*;
- An explanation of findings and conclusions as to the comparability of the processes, strategies, evidentiary standards, and other factors used in designing and applying the NQTL to mental health or substance use disorder benefits and medical/surgical benefits, including an explanation of any additional actions the plan has taken or intends to take to address any potential areas of concern or non-compliance.

While there is no requirement to file these comparative analyses by a particular deadline, the plan sponsor might be asked by the Secretary of Labor (or Health and Human Services or Treasury) to produce their comparative analyses within 10 business days. Once the comparative analyses have been provided, the Departments will review them and make an initial determination of compliance or non-compliance. In the case of non-compliance, the plan will have 45 calendar days to take steps needed to bring their plans into compliance. If they are unable to do that, they will be required to notify the plan's participants of the final determination of non-compliance.

These comparative analyses also must be provided to relevant state regulators and to plan participants or beneficiaries upon request, as well.

11th Circuit to Rehear Case about Health Plan Coverage of Gender-Affirming Care

The 11th Circuit Court of Appeals has vacated a three-judge panel holding that a group health plan illegally discriminated against a transgender participant by denying coverage for gender-affirming surgery. The full 11th Circuit, sitting *en banc*, will rehear the case and issue a new ruling – probably sometime next year.

Case Background

At issue in the 11th Circuit case is a group health plan sponsored by a local government for its employees. An employee was diagnosed with gender dysphoria, and her doctors determined vaginoplasty surgery was medically necessary for her treatment. However, the health plan denied the claim based on the plan's exclusion of "[d]rugs for sex change surgery" and "[s]ervices and supplies for a sex change and/or the reversal of a sex change."

Because a three-judge panel of the 11th Circuit Court of Appeals concluded that only transgender participants would seek gender-affirming surgery, it ruled the plan's denial of coverage was based on transgender status. Since the Supreme Court has previously held that discrimination based on transgender status is discrimination based on sex, the court concluded that the plan's exclusion violated Title VII of the Civil Rights Act of 1964. Title VII generally prohibits employment-related discrimination based on race, color, religion, or sex, among other things.

Around the same time, the 4th Circuit Court of Appeals reached a similar conclusion in two consolidated cases: one involved the group health plan for a state's employees, and the other involved a different state's Medicaid program. In both cases, the plans specifically excluded coverage for certain types of gender-affirming care, even if the same treatments would be covered if sought for other purposes – e.g., breast cancer. The 4th Circuit ruled that these coverage exclusions represent state discrimination based on gender identity, which is prohibited by the 14th Amendment's equal protection guarantee. The 4th Circuit also concluded that the state Medicaid program's exclusion violated Medicaid and Section 1557 of the Affordable Care Act, which prohibits health plans receiving federal financial assistance from discriminating based on sex and certain other protected categories.

Outlook

As noted, the full 11th Circuit will rehear the case and render a new decision, which may or may not agree with the one reached by the three-judge panel.

The 4th Circuit Court of Appeals decision still stands, although it could be appealed as well.

New Court Rulings Upend Abortion Laws in North Dakota and Georgia

While the upcoming November elections could determine the abortion laws in several states, even states where abortion is not on the ballot this year are experiencing shake-ups of their abortion laws. Just recently, a North Dakota court struck down the state's near-total abortion ban, and a Georgia court's ruling striking down the state's six-week ban was effective for only a week before the state's highest court put the ruling on pause.

North Dakota

Since April 2023, North Dakota has had a strict abortion law in place that banned abortions at every stage in pregnancy except in very narrow circumstances. But on September 12, 2024, a North Dakota state court struck down this strict abortion ban. In the ruling, the court held that the state constitution covers abortion prior to the fetus becoming viable because the

constitution protects the "fundamental right to procreative autonomy." The court also concluded that the near-total abortion ban's exceptions are too vague in practice, and therefore the law is unconstitutional.

As a result of the ruling, state law has now reverted back to a 20-week ban, which includes exceptions for the pregnant individual's health or life, medical emergency, or ectopic pregnancies. It is not clear how long the 20-week law will stay in effect, however, because the Attorney General has already appealed the lower court's ruling to the state supreme court. While the reinstatement of the 20-week ban is welcome news to abortion supporters, in practice, North Dakota no longer has any abortion clinics, as the last clinic moved across the border to Minnesota in 2022.

Georgia

On September 30, 2024, the Fulton County Superior Court struck down Georgia's "fetal heartbeat" law, which had been in effect since 2022. In the ruling, the judge explained that the state constitution's protections for "liberty" include "the power of a woman to control her own body." The court did note that this right is not unlimited – the state may intervene when the fetus reaches viability. As a result of the ruling, abortion temporarily became legal in Georgia for up to 20 weeks.

The state's reversion to the 20-week law was abruptly halted just a week later when, on October 7th, the Georgia Supreme Court issued a ruling pausing the lower court's decision. The high court said that the lower court's decision will remain paused while it considers the Georgia Attorney General's appeal in the case. In the meantime, Georgia's law once again returns to the six-week ban.

More Abortion Law Developments Likely for 2024

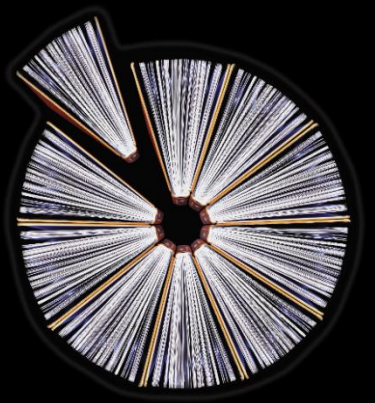
More developments in 2024 are likely. Currently, a total of 10 states – Arizona, Colorado, Florida, Maryland, Missouri, Montana, Nebraska, Nevada, New York, and South Dakota – are slated to have abortion-related measures on the November 2024 ballot.

Visit the Archive

All previous issues of the Rewards Policy Insider are archived on Deloitte.com and can be accessed here.

Don't forget to bookmark the page for quick and easy reference!

Upcoming editions will continue to be sent via email and will be added to the site on a regular basis.



Get in touch

Subscribe/Unsubscribe