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In This Edition:

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Mental Health Parity Rules: Updated Guidance and Enforcement

In its on-going effort to ensure compliance with mental health and substance abuse parity laws, the Department of Labor's Employee Benefit Security Administration (EBSA) has issued additional guidance. In addition, the agency released a modified disclosure request form, and a summary of its enforcement activities of these laws during 2018.

Finalized FAQ Guidance

In large part, the FAQ guidance focuses on the application of nonquantitative treatment limitations imposed on mental health and substance abuse services, which must be comparable to those imposed on medical and surgical services. These FAQs provide clarifications relating to:

- Exclusions for treatment that are considered experimental or investigative (Qs 1 and 2);
- Prescription drug coverage (Qs 3 and 4);
- Step therapy protocols or fail-first policies as they apply to in-patient and out-patient treatment (Q5);
- Comparable provider reimbursement rates (Q6) and network provider participation standards (Q7); and
- Coverage for eating disorders (Q8).

FAQs 9-11 amplify prior guidance relating to disclosure of accurate plan materials to ensure current information is available to participants and enrollees. Under ERISA, if a plan utilizes a network of providers, then its summary plan description (SPD) must contain an up-to-date, accurate, and complete general description of the participating provider network. The provider directory can be provided as a separate document to accompany the plan's SPD as long as it is furnished automatically, without charge, and the SPD contains a statement to that effect. Any changes made to the document can be communicated to participants by way of a summary of material modification.

Continued from Page 1

Similarly, the Affordable Care Act (ACA) requires insurers to make available an up-to-date, accurate, and complete provider directory to enrollees. Whether required by ERISA, or by the ACA, updated provider information can be provided electronically, as long as the relevant electronic disclosure methodologies are followed.

Finalized disclosure request form

Participants of individual and employer-sponsored group health plans, or their authorized representatives, have the right to request information about plan coverage, or to solicit information from the plan following an adverse determination of their mental health or substance use disorder benefits to support an appeal. EBSA revised its model form (***Mental Health and Substance Use Disorder Parity Disclosure Request***) which can be used for this purpose. While it is not mandatory for individuals to use this model notice, it does provide a means in which the individual, or his/her representative, can request benefit information. Group health plan sponsors or administrators are obligated to provide the requested information within 30 days of receiving the individual's request.

Enforcement activities in 2018

For the past several years, EBSA has released a summary of its enforcement efforts of the mental health parity laws. According to its **Fact Sheet,** the agency investigated and closed 285 health plan investigations in 2018, of which 21 plans, were cited for violation. The agency investigates plans based on a number of parameters including annual and lifetime limitations, classification of benefits, financial requirements (deductibles, co-pays, coinsurance, or out-of-pocket maximums), treatment limits, cumulative financial requirements, as well as processing claims and disclosure violations. The majority of violations in 2018 involved annual and lifetime limit provisions (55%) and financial and quantitative treatment limitations (35%).

The bottom line is that EBSA is serious about compliance with the mental health parity laws.

Additional information relating to the mental health parity laws is available from **EBSA's dedicated webpage**.

IRS Finalizes Hardship Distribution Rules

Qualified retirement plans including 401(k) plans, 403(b) and 457(b) plans may, but are not required to, allow hardship distributions from the plan upon certain events, such as an immediate and financial need to pay medical or funeral expenses, purchase of a principal residence, or payment of tuition and education expenses. If a plan permits a hardship distribution, it must provide the specific criteria to determine the actual hardship.

The Bipartisan Budget Act of 2018 eased the criteria for certain hardship distribution rules. The IRS subsequently released proposed regulations in November, 2018 to implement these changes. Final regulations were **published** on September 23, 2019. These final regulations:

1. Modify the safe harbor list of expenses and distributions that are deemed to be made for an immediate and heavy financial need by:
   - Adding "primary beneficiary under the plan" as one for whom qualifying medical, educational, and funeral expenses may be incurred;
   - Including expenses for the repair of damage to the employee's principal residence that would qualify for the casualty deduction IRC Section 165; and
   - Including loss of income as a result of a FEMA-declared disaster that occurs in the area of the employee's principal residence his/her principal place of employment.

2. Modify the rules for determining whether a distribution is necessary to satisfy an immediate and heavy financial need by eliminating the requirement that prohibits participants from making elective contributions and employee contributions for at least six months following receipt of the hardship distribution. Further, a participant need not take all available plan loans prior to taking a hardship distribution.

3. Permit hardship distributions to be taken from elective contributions, qualified nonelective contributions ("QNECs"), qualified matching contributions ("QMACs"), together with earnings on such amounts, regardless of when contributed or earned.

Effective date. Generally, the rules become effective for hardship withdrawals made on or after January 1, 2020 for plans adopting such changes. However, plan sponsors may amend their plan to retroactively apply these changes for distributions made on or after January 1, 2018.

DOL Issues Final Overtime Regulations

The Wage and Hour Division of the Department of Labor (DOL) regulates exempt vs. nonexempt status for employees. Regulations were issued in 2016 changing several aspects of this determination. These regulations were challenged in court and ultimately never took effect (see *Overtime Rules Thrown Out for Now*, *Benefit Beat*, September 2017).

On September 24, 2019, the DOL released a new set of **final regulations**, which will take effect on January 1, 2020.

As background, an individual who is non-exempt is entitled to overtime pay for all hours he/she works over 40 in a week. To be exempt, an employee must meet several tests, including:

1. A *salary basis test* wherein the individual is paid a predetermined and fixed salary that is not subject to be reduced as a result of variations in the quality or quantity of work performed;
2. A *salary level test* in which the individual is paid a specified weekly salary level; and
3. A *duties test* wherein the individual primarily performs executive, administrative, or professional duties, as defined in the DOL's regulations.

The final regulations increase the "salary level test" standard from $455 per week to $684 per week, which is equivalent to $35,568 per year for a full-year worker. While the regulations increase the salary level baseline, they do not, in any way, change the duties test.

In addition to raising the salary level, these regulations allow up to 10% of this amount to be attributable to nondiscretionary bonuses and incentive payments, including commissions. Importantly, it is essential for an employer attributing these funds to make absolutely certain that the minimum floor is being met. The employer has one month after the close of the measurement year (which can be any 52-week period) to make any correction.

In addition, the regulations increase the annual compensation limit for purposes of determining highly compensated employees from $100,000 per year to $107,432 per year.

Notably, these regulations do not include an automatic escalator for salary amounts. The previously issued regulations did include an auto escalator, which was one of the points to which exception was taken.

While it is possible these regulations may be challenged, employers should begin to prepare for the January 1, 2020 effective date.

The Wage & Hour Division has established a **webpage** for additional information relating to these final rules, including a **Fact Sheet, FAQs,** and **Small Entity Guideline.**

EEO-1 Report Update

As discussed in our May and August editions, employers subject to EEO-1 reporting requirement were required to submit a second report containing Component 2 data, which was due by September 30, 2019 (see *EEO-1 Report Expanded*, and *EEO-1 Report Update: Component 2 Data Reporting Requirement*). The **EEO-1 Report** is a compliance survey mandated by federal law that requires affected entities to report employment data by race or ethnicity, gender and job category, referred to as Component 1 data; Component 2 data refers to salary information reported on employees' W-2, together with hours worked.

In a recent **notice** requesting re-authorization for continuing the collection of Component 1 data, which has been required for a number of years, the Equal Employment Opportunity Commission did not request re-authorization for collecting Component 2 data. What this means for now is that the required reporting of Component 2 data for 2017 and 2018 data, is, until further notice, a one-time obligation.

2020 Updates: New York Paid Family Leave Program

The New York paid family leave benefit took effect on January 1, 2019. This law builds on the state temporary disability law and provides paid time off for baby bonding, to care for a family member, or military exigency. The paid family leave benefit is fully funded by employees through a payroll deduction. At its discretion, the employer can choose to pay all or a portion of the cost of the program.

The New York Department of Financial Services (DFS) recently announced some updates to the program for 2020, as follows:

- Eligible employees are entitled to take up to 10 weeks of paid leave.
- The contribution amount will increase to 0.270% of an employee's gross wages each pay period, with a maximum annual contribution cap of $196.72.

Employees earning less than the current statewide average weekly wage of $1,401.17 will contribute less than the annual cap, consistent with their actual wages.

- The benefit amount will increase to 60% of an individual's average weekly wage, up to a cap of 60% of the current statewide average weekly wage amount. The maximum weekly benefit for 2020 is $840.70.

The DFS also provides updated materials and templates to assist employers in communicating these 2020 updates to their workforce, including:

- PFL At-A-Glance for 2020
- Model Language for Employee Materials (updated for 2020)
- Employee Notice of Paid Family Leave Payroll Deduction for 2020
- Statement of Rights for Paid Family Leave (PFL-271S) for 2020

Additional information about the New York Paid Family Leave Program is available on the state's dedicated webpage.

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