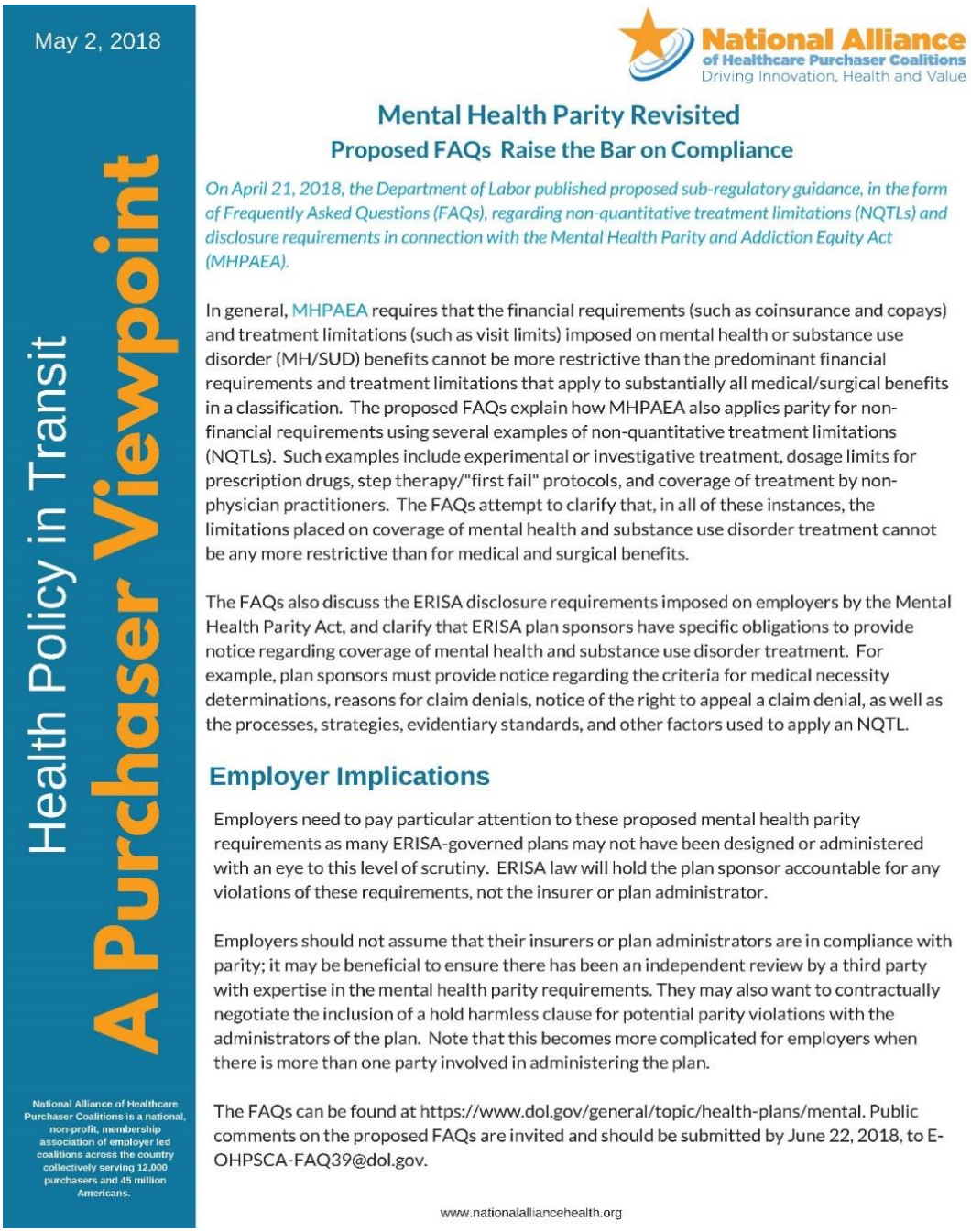
National Alliance of Healthcare Purchaser Coalitions
Driving Innovation, Health and Value

Mental Health Parity Revisited

April 2019 Update

Since the April 2018 publication of sub-regulatory guidance on mental health parity, there has been some important activity in the courts testing some of these issues. All of these cases are still working their way through the court system on appeal, so these rulings are not binding on the industry yet, but employers should be closely monitoring these cases.

One case is a class action lawsuit in which the trial court recently ruled in favor of the class, stating that health plan violated ERISA. The judge stated that the guidelines used by the health plan to establish coverage decisions for mental health and substance use care were unduly restrictive and "tainted by (the health plan's) financial interests." Two other cases involving a different health plan are also moving through the courts in Massachusetts and Pennsylvania. These cases involve network adequacy standards and requirements for pre-authorization. The courts in those states found that the health plan was violating parity requirements by administering networks and prior authorization differently in medical/surgical than mental health and substance use.



May 2, 2018

Health Policy in Transit

A Purchaser Viewpoint

National Alliance of Healthcare Purchaser Coalitions is a national, non-profit, membership association of employer led coalitions across the country collectively serving 12,000 purchasers and 45 million Americans.

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Proposed FAQs Raise the Bar on Compliance

On April 21, 2018, the Department of Labor published proposed sub-regulatory guidance, in the form of Frequently Asked Questions (FAQs), regarding non-quantitative treatment limitations (NQTLs) and disclosure requirements in connection with the Mental Health Parity and Addiction Equity Act (MHPAEA).

In general, MHPAEA requires that the financial requirements (such as coinsurance and copays) and treatment limitations (such as visit limits) imposed on mental health or substance use disorder (MH/SUD) benefits cannot be more restrictive than the predominant financial requirements and treatment limitations that apply to substantially all medical/surgical benefits in a classification. The proposed FAQs explain how MHPAEA also applies parity for non-financial requirements using several examples of non-quantitative treatment limitations (NQTLs). Such examples include experimental or investigative treatment, dosage limits for prescription drugs, step therapy/"first fail" protocols, and coverage of treatment by non-physician practitioners. The FAQs attempt to clarify that, in all of these instances, the limitations placed on coverage of mental health and substance use disorder treatment cannot be any more restrictive than for medical and surgical benefits.

The FAQs also discuss the ERISA disclosure requirements imposed on employers by the Mental Health Parity Act, and clarify that ERISA plan sponsors have specific obligations to provide notice regarding coverage of mental health and substance use disorder treatment. For example, plan sponsors must provide notice regarding the criteria for medical necessity determinations, reasons for claim denials, notice of the right to appeal a claim denial, as well as the processes, strategies, evidentiary standards, and other factors used to apply an NQTL.

Employer Implications

Employers need to pay particular attention to these proposed mental health parity requirements as many ERISA-governed plans may not have been designed or administered with an eye to this level of scrutiny. ERISA law will hold the plan sponsor accountable for any violations of these requirements, not the insurer or plan administrator.

Employers should not assume that their insurers or plan administrators are in compliance with parity; it may be beneficial to ensure there has been an independent review by a third party with expertise in the mental health parity requirements. They may also want to contractually negotiate the inclusion of a hold harmless clause for potential parity violations with the administrators of the plan. Note that this becomes more complicated for employers when there is more than one party involved in administering the plan.

The FAQs can be found at https://www.dol.gov/general/topic/health-plans/mental. Public comments on the proposed FAQs are invited and should be submitted by June 22, 2018, to E-OHPSCA-FAQ39@dol.gov.

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Plan Sponsor Implications

The current rulings in these cases point toward an interpretation of the parity regulations and guidance in which the effect of the polices may matter as much as the process used to create them. The end effect on the consumer, and whether they could access the care needed, may matter more than whether a plan can prove it complied with the guidance "on paper."

Consequently, plan sponsors should consider obtaining and reviewing health plan performance data such as that set forth in the Model Data Request Form. Plan sponsors should also be cognizant of the scope of their indemnification clauses in vendor contracts particularly as it relates to mental health parity (Model Hold Harmless Language).

The industry continues to be in transition to address systemic issues related to parity in behavioral health care. These steps by plan sponsors would beneficially influence the performance and practices of their vendors in this regard.