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Employee Benefit Plan Review

U.S. Department of Labor Settles Unprecedented Lawsuit Against United Healthcare for Alleged Violations of the Mental Health Parity and Addiction Equity Act

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In the clearest indication yet of the increased enforcement of the Mental Health Parity and Addiction Equity Act ("MHPAEA") under the Biden-Harris administration, two settlement agreements filed on August 11 provide that United Healthcare Insurance Co., United Behavioral Health, and Oxford Health Insurance Inc. (collectively, "United") will together pay more than $15.6 million to settle allegations[1] they violated the federal mental health parity law. The settlements in the case, *Walsh v. United Behavioral Health*, include $2.5 million to resolve claims brought by the U.S. Department of Labor ("DOL"), $1.1 million for claims brought by the New York Attorney General, over $2 million in penalties, and $10 million from private litigants. The complaints from the New York Attorney General and class of private litigants paralleled the allegations raised in DOL's complaint (brought under Chapter 748 of the Laws of 2006 ("Timothy's Law") (New York State's state-level parity law) and 29 U.S.C. § 1132(a)(3), respectively).

DOL's Use of Litigation to Enforce MHPAEA Against an Administrative Service Provider/Insurer

The enforcement actions reflect the first instance in which DOL has initiated litigation to enforce MHPAEA against a health insurance issuer, health plan, or administrative service provider in the 13 years since the initial passage of the statute. Each year, DOL has engaged in dozens of investigations of Employee Retirement Income Security Act ("ERISA")-regulated health plans. Such investigations frequently focus on administrative policies and processes that are designed and operated by an insurer, third-party administrator, or administrative service organization, such as United, that the employee benefit plan sponsor (the employer) contracts to implement the health plan. Previously, when DOL found a benefit plan sponsor to be out of compliance, DOL has generally required the benefit plan sponsor to take corrective actions, including changes to the plan policy and reprocessing of improperly denied claims, and frequently reached voluntary

agreements with administrative service providers/insurers to take corresponding actions across all benefit plan sponsor clients with the same or similar policies.

The Consolidated Appropriations Act of 2021 ("CAA") amended MHPAEA to create new compliance documentation requirements and new authority for federal regulators to determine that a health plan or issuer's documentation was insufficient to demonstrate compliance. The CAA also requires the plan or issuer to notify enrollees within seven days of a finding of noncompliance, and requires federal regulators to identify by name all plans and issuers determined to be noncompliant in an annual report to Congress.[2]

However, neither the original MHPAEA statute nor the CAA authorizes DOL to take direct enforcement action against administrative service providers without a showing that the service provider had assumed the fiduciary duties of the benefit plan sponsor (which DOL did here), and DOL has never before initiated litigation for violations of MHPAEA. Thus, it is notable that in *Walsh*, DOL has used its authority under ERISA Section 502(a)(5)[3] to seek injunctive relief and penalties in federal court directly against an administrative service provider for violations of MHPAEA as the fiduciary to beneficiaries of a wide range of benefit plan sponsors, none of whom were themselves a party to the suit.

Although the settlement amounts are small relative to United's total profits ($4.9 billion in the first quarter of 2021 alone),[4] the use of this approach represents an important shift in DOL's enforcement of MHPAEA. The use of DOL's independent litigation authority has a much more significant reputational and market impact on a targeted service provider and increases the risk of the target being the subject of additional litigation under 29 U.S.C. § 1132(a)(3). In this sense, the highly public nature of the litigation against United as an administrative service provider is comparable to the new "naming and shaming" of health plans and issuers determined to be noncompliant under the CAA.

DOL's actions in *Walsh* may be seen as a sign of the increased emphasis the Biden-Harris administration will be putting on MHPAEA enforcement. Ali Khawar, the acting assistant secretary for DOL's Employee Benefits Security Administration ("EBSA"), was quoted at the press briefing announcing the settlement as stating that "[e]nforcing the mental health parity law is a very high priority for the Department of Labor and this administration," and "[t]he secretary of labor views this as probably our top health enforcement priority for EBSA."[5] This approach is also an indication of DOL's decision to prioritize enforcement actions directly against the insurance company service providers rather than employer health plan sponsors.

DOL's MHPAEA Claims in *Walsh*

Non-Quantitative Treatment Limitations

The MHPAEA regulations require that plans and issuers that apply nonquantitative treatment limitations ("NQTLs") (including out-of-network reimbursement methodologies, a variety of utilization management strategies, and various aspects of prescription drug benefit design) to mental health and substance use disorder treatment benefits do so in a manner that is comparable to and no more stringent than how these are applied to medical-surgical benefits.

DOL's complaint in *Walsh* raised two key claims about United's benefit design and delivery for certain specific ERISA fully-insured and fully and partially self-funded group health plan clients (none of which were party to the lawsuit).

In particular, the complaint alleged that United applied an out-of-network reimbursement methodology that systematically disadvantaged mental health treatment providers, and applied outlier management (a type of utilization management) to outpatient mental health benefits that were disproportionate to and more stringent than the outlier management applied to outpatient medical/surgical benefits.

DOL's complaint with regard to out-of-network reimbursement rates specifically identified a disparity between rate levels for mid-level medical/surgical and mental health providers. For all professional providers, United started with a third-party rate set by Medicare or an independent vendor such as Fair Health or Viant. For non-physician providers, United applied a discount of 25 percent for psychologists and 35 percent for master's level counselors as compared to the physician rate for the same service. In contrast, United did not impose a discount for most non-physician medical/surgical providers (such as nurses or physical or occupational therapists, though the complaint did acknowledge a comparable rate reduction for assistant surgeon services). DOL specifically alleged that United did not articulate any consistent factors that were used to determine which providers to subject to the reductions and why. DOL therefore concluded that this disparate approach to applying rate reductions for out-of-network mid-level providers violated MHPAEA's comparability and stringency requirements.

DOL's complaint also alleged that United's outlier management strategy was disproportionately applied to mental health benefits. United applied an algorithm to identify and manage/deny medically unnecessary services to nearly all outpatient psychotherapy services while only using a corresponding outlier technique on a very limited set of medical and surgical outpatient services. The complaint did not describe the evaluation methodology or threshold for compliance that DOL used to determine that the greater number of mental health services subject to the outlier management program constituted a

disparity. The complaint did specifically allege that the data sets United used to apply outlier management to mental health benefits were not comparable to the data sets used for outlier management of medical and surgical benefits, though it did not identify or describe the data sets or elaborate on the precise nature of the non-comparability. The lack of details in the complaint makes it difficult for observers to draw specific conclusions about parity compliance for outlier management programs operated by other insurers and administrative service providers.

Nonetheless, DOL's approach to these NQTLs (out-of-network reimbursement and outlier management) does provide some useful insights into their perspective on MHPAEA compliance. In particular, the complaint makes it clear that DOL considers the use of any NQTL approach on a large majority of mental health/substance use disorder benefits but only a relatively small portion of medical-surgical benefits to constitute a MHPAEA violation. DOL has alluded to a ratio-based quantitative analysis to identify any disproportionate or more stringent application of an NQTL to benefits in the preamble to final rules and Frequently Asked Questions ("FAQs"), but this complaint provides an important indicator the federal regulators will be exercising such an enforcement approach.[6]

Based on the complaint and settlements in *Walsh*, issuers and health plans should carefully review both the consistency of the factors they use to determine which benefits should be subject to a given NQTL type as well as the ratio of mental health/substance use disorder benefits subject to an NQTL type compared to the application of the same NQTL to medical-surgical benefits in the same classification.

Disclosures

DOL also alleged, in the *Walsh* complaint, that deficiencies in United's disclosures to client plans, participants, and beneficiaries about MHPAEA violated the statute. In particular, the complaint alleged that the disclosures did not include specific information about the NQTL types at issue in the complaint (out-of-network reimbursement and outlier management), and that the information that was provided was not sufficiently individualized for participants seeking information about the application of NQTLs to their personal benefits.

This element of the complaint marks a major milestone in MHPAEA enforcement as the first public enforcement action of the disclosure requirements outlined in MHPAEA (which extend existing disclosure requirements under ERISA), implementing regulations, and the DOL guidance. The disclosure obligations under MHPAEA have been the subject of numerous FAQs by DOL in the past, but enforcement of the expectations provided in the FAQs has been relatively limited.[7]

The complaint's allegations that the disclosures failed to address the specific NQTLs identified by the regulators may indicate that DOL is willing to exercise enforcement against issuers and plans that do not have required disclosures available upon request for any and all NQTLs that may be identified. The complaint may signal DOL's priority of enforcing the adequacy of parity compliance documentation under the CAA. The allegation in the complaint that United's disclosures were not sufficiently individualized is also an important indicator that DOL will be expecting issuers and plans to have the capacity to produce responsive NQTL disclosures describing the specific application of any NQTL to a particular participant. This is an extremely onerous obligation and will require substantial efforts to not only prepare a participant-friendly form explaining any NQTL, but one that provides the factual specifics as applied to a particular participant. A disclosure of this nature would far exceed the standard claim denial reason and appeal explanations that issuers and plans are used to providing to participants under ERISA.

Conclusion

Taken together, DOL's complaint and settlement in *Walsh* are a clear indicator of the increased attention and effort DOL will be giving MHPAEA compliance under the Biden-Harris administration. They also provide important insights into how DOL is approaching the NQTL comparability and stringency analysis as well as the disclosure obligations.

Notes

1. *Walsh v. United Behavioral Health*, E.D.N.Y., No. 1:21-cv-04519 (8/11/2021).
2. Internal Revenue Code (Code) section 9812(a)(8), ERISA Section 712(a)(8), and Public Health Service (PHS) Act section 2726(a)(8). *See also* EMPLOYEE BENEFITS SECURITY ADMINISTRATION UNITED STATES DEPARTMENT OF LABOR FAQS ABOUT MENTAL HEALTH AND SUBSTANCE USE DISORDER PARITY IMPLEMENTATION AND THE CONSOLIDATED APPROPRIATIONS ACT, 2021 PART 45, *https://www.dol.gov/sites/dolgov/files/DOL/about-DOL/our-activities/resource-center/faqs/aca-part-45.pdf*.
3. 29 U.S.C. § 1132(a)(5).
4. News release, "UnitedHealth Group Reports First Quarter Performance," April 15, 2021. Accessed 08/13/2021 at *https://www.unitedhealthgroup.com/viewer.html?file=/content/dam/UHG/PDF/investors/2021/UNH-Q1-2021-Release.pdf*.
5. Bloomberg Law, *UnitedHealthcare Inks Settlement Over Mental Health Coverage (4)* Aug. 11, 2021, 3:00 PM; Updated: Aug. 12, 2021, 12:44 PM; *available at https://news.bloomberglaw.com/health-law-and-business/unitedhealthcare-sued-by-feds-over-mental-health-coverage*.
6. *See* 78 FR 68240, 68245 (Nov. 13, 2013). *See also* FAQs About Affordable Care Act Implementation (Part VII) and Mental Health Parity Implementation (November 17, 2011) at Q&A-5 *https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-vii.pdf* and *https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/aca_implementation_faqs7.html*.
7. *See* EMPLOYEE BENEFITS SECURITY ADMINISTRATION UNITED STATES DEPARTMENT OF LABOR FACT SHEET FY 2020 MHPAEA ENFORCEMENT, *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/mhpaea-enforcement-2020.pdf*.

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