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4 Tips To Help Benefits Plans Achieve Mental Health Parity

By **Emily Brill**

Law360 (October 20, 2020, 8:24 PM EDT) -- As federal benefit regulators turn their focus toward plans' mental health offerings and California lawmakers expand plans' obligations in that area, now is a great time for employers to ensure their plan approaches mental health treatment the same way as traditional medical care.

Compliance with the federal Mental Health Parity and Addiction Equity Act and similar state legislation — such as California's S.B. 855, signed into law Sept. 25 — can help maintain a healthy workforce, particularly during a pandemic that has affected more than half of Americans' mental health, according to a Kaiser Family Foundation poll.

Failure to comply, on the other hand, exposes employers to two types of risk: investigation by a U.S. Department of Labor that has zeroed in on enforcing the federal parity law, and litigation by plan participants who can't get proper treatment for their conditions.

"It's not only the DOL coming after you — there's litigation. It's a double threat," said Judith Wethall, a benefits partner at McDermott Will & Emery LLP.

Here, Law360 offers four tips on complying with mental health parity laws.

Ensure Access

Parity laws require benefit plans to cover mental health and substance abuse treatment the same way they cover treatment for physical maladies such as cancer or broken bones.

The impetus behind these laws was to increase working Americans' access to affordable mental health treatment, which was limited before the first federal parity law passed in 1996.

To achieve this policy goal, laws such as the Mental Health Parity and Addiction Equity Act include a number of provisions intended to increase treatment access, like banning any limits on mental health benefits that don't also exist for physical health benefits.

To comply, attorneys recommend doing away with mental health treatment limits as much as is feasible. If a plan doesn't limit doctor's office visits, it shouldn't limit visits to a psychotherapist, said Kathleen Cahill Slaught, a partner in the labor and employment practice at Seyfarth Shaw LLP.

Slaught also cautions her clients against hinging mental health care approval on the likelihood of a treatment's success, because that creates barriers to accessing newer therapies, she said.

"Any limitation you have is something the DOL is going to ask about," Slaught said.

Plan sponsors can ensure mental health treatment is accessible by maintaining a robust network of providers and educating workers about who's in that network, said Tim Stanton, a shareholder at Ogletree Deakins Nash Smoak & Stewart PC and member of the firm's benefits practice.

Stanton recommended employers ask their plan administrators what more they can do to ensure workers know about in-network provider options — particularly the parents of teenagers with mental health issues, who often turn to out-of-network providers in moments of crisis.

"Well-resourced companies have this concern about parents and teenagers getting the support they need. I'd want to know from outside administrators: What more can we do so people know what they need to know about our in-network providers?" Stanton said. "Do you have programs that I could tap into that focus on parents in this situation, or on treatments in this situation?"

Get Clear on Medical Necessity

Mental health parity lawsuits often challenge insurers' classification of a treatment as "not medically necessary." To avoid getting hit with these suits, attorneys encourage employers to learn about their insurer's or third-party administrators' standards for deeming a treatment medically necessary, and make sure those standards are applied evenly across the board.

"See if they're applying the medical necessity standards more strictly to mental health than to surgery, for example," Slaught said.

California's new mental health parity law creates a three-part test for determining if a mental health or substance abuse treatment is medically necessary: The treatment must be clinically appropriate, aligned with generally accepted standards of care, and prescribed for reasons other than financial enrichment or convenience.

California-based employers should take note of this new test and ensure their plan follows it, said Michelle McCarthy, the practice group leader of Morgan Lewis & Bockius LLP's Southern California-based employee benefits and executive compensation practice.

"The law establishes these detailed, uniform standards for evaluating medical necessity," McCarthy said. "I think you would want to put that in your plan document to ensure you're complying with that provision."

When a plan denies coverage for mental health treatment, administrators must explain why the treatment wasn't deemed medically necessary, Slaught said. Employers should make sure their administrators' disclosures are adequate, because the DOL often targets this paperwork in audits, she said.

"There's a focus on it with the DOL. If the plan's going to say, 'No, you're not entitled to these mental health benefits,' you need to make sure there's adequate disclosures for who determined it wasn't medically necessary and why," Slaught said.

Audit Your Plan

The best way to avoid a problematic DOL audit on mental health parity issues is to audit your own plan to ensure compliance before the agency enters the picture, attorneys say.

Well-resourced employers can hire a consultant to conduct the audit, while newer or smaller companies can use the DOL's self-audit tool, released this year, attorneys said.

The audit should include a look at the plan's prescription component, ensuring it's covering medication for addiction and mental health at a similar rate to pain meds and other similar drugs, Stanton said.

"The idea of doing some internal compliance reviews, auditing, or monitoring on a regular basis could give companies some peace of mind, making sure their plans are well-administered and maintained by outside providers," Stanton said.

Employers shouldn't assume their third-party administrator and insurer are sufficiently auditing themselves, or that their plan is designed to comply with mental health parity laws, Wethall said.

"You can't necessarily take the word of your TPA or even your insurer, because many plans are structured by TPAs or insurers and they don't comport with mental health parity," Wethall said. "I've seen lots and lots of designs that fall into our lap and we raise the red flag."

It's important to catch these issues, because the DOL holds employers liable for problems with mental health parity compliance even if those issues originate from a TPA or insurer, Wethall said.

Address Common Issues

Mental health parity lawsuits crop up more often on certain types of treatment than others. Litigation magnets include autism treatment, wilderness therapy for teenagers' behavioral health issues and eating disorder treatment.

Stanton recommends that plans lay out their approach to covering these treatments in the summary plan document, to avoid confusion that could lead to litigation.

"Make sure the plan and summary plan document are clear on a few benefits: autism treatment, residential treatment for mental health and substance abuse, opioid addiction treatment and eating disorder treatment," Stanton said. "Make sure the SPD is clear on what's covered there and what isn't."

--Editing by Brian Baresch and Emily Kokoll.