



Tri-agency FAQs tell employers to produce robust and well-reasoned mental health parity analyses

By Yelena Gray, Damian Myers, and Lena Gionnette

Mandated by the Consolidated Appropriations Act, 2021 (CAA), the Departments of Labor, Treasury, and Health and Human Services (Departments) are beginning to examine comparative analyses showing health plans' compliance with the federal mental health parity requirements. In [recently issued FAQs](#), the Departments made it abundantly clear that **general statements of compliance and conclusory references will not suffice in demonstrating parity**. The Departments will be looking for detailed and well-reasoned explanations of the application of the nonquantitative treatment limitations (NQTLS) to mental health and substance use disorder (MH/SUD) benefits as compared to medical and surgical (MS) benefits in each of six benefit classifications. In our [previous alert](#), we discussed the CAA's parity mandates. Below, we address the Departments' expectations in examining health plans' NQTLS parity compliance, as explained in the FAQs.

The Departments confirmed that the Mental Health Self-Compliance Tool may serve as a guide to plans in performing comparative analyses. A careful application of the Self-Compliance Tool will put plans in a strong position to demonstrate compliance. The Tool outlines four steps plans must follow when analyzing NQTLS and provides examples of the factors, evidentiary standards, and other sources that the plan might have relied on and should document in their reports:

- In step one, the plan must identify the NQTLS in each classification.
- In step two, the plan must describe the factors that were considered in developing each NQTL.
- In step three, the plan must explain the sources it used to define each factor.
- Finally, in step four, the plan must demonstrate that all the factors, standards, and processes identified in the preceding steps were comparable to and applied no more stringently to mental health benefits than those that were applied to medical benefits.

A written, well-reasoned, and robust analysis of compliance with the NQTL parity requirements must at a minimum contain the following elements—in other words, the “whys” and “wherefores” of the limitations and their application as written and in operation:

- A clear description of the NQTLs and the plan's relevant terms and policies.
- Identification of NQTLs applicable to mental health and medical benefits in each classification (in and out-of-network inpatient and outpatient benefits, emergency care, and prescription drug benefits).
- The factors, evidentiary standards, or sources or strategies or processes considered in the design or application of the NQTL and in deciding to which MH/SUD and MS benefits the limitations will apply. The analysis must explain why any factors were given more weight and based on what evidence.
- If a plan defines any evidence in a quantitative manner, it must list precise definitions and sources to back up the evidence.
- If the plan's application of the NQTLs varied among MH/SUD and MS benefits, the plan must explain how it justifies the variations (with supporting factors and evidence).
- Where the application of a NQTL turns on the circumstances of a specific case, the plan must explain the nature and the timing of the decision and identify the decision-maker, as well as the decision-maker's qualifications.
- If the plan's analysis of the NQTL parity relies on an expert's opinions, the plan must document an assessment of the expert's qualifications and the extent to which the plan relied on the expert's recommendations.
- The analysis must include a reasoned discussion of the findings that the factors and standards outlined above are comparable among MH/SUD and MS benefits in each classification and not applied more stringently to MH/SUD benefits than to MS benefits. The written analysis must cite to specific evidence considered and any results that lead to the conclusion that the plan is or is not in compliance with the NQTL parity.
- The analysis must list the date it was performed and the names, positions, and titles of the persons that performed or participated in the analysis.

All analyses must be recent and not based on outdated information.

Plan sponsors and insurance issuers should be prepared to provide additional documentation to the Departments, including records of the NQTLs' development and application, claim processing guidelines, details of any internal testing or review done in determining the relative stringency of the NQTL applications, as well as evidence supporting the plan's conclusions.

The FAQs reminded plan sponsors that the Departments may identify noncompliance and give the offending plan forty-five (45) days to come into compliance and submit an updated comparative analysis report. If a plan fails to cure noncompliance, the Departments will notify plan enrollees of its conclusions. Furthermore, plan participants and their providers are entitled to receive comparative analyses reports regarding medical necessity. Plans subject to the Employee Retirement Income Security Act (ERISA) must also produce these analyses to claimants if any part of their claim is denied.

Although the Departments may request, and the plan must be ready to produce, comparative analyses of any and all NQTLs applied to MH/SUD benefits, the Departments will initially focus on four limitations:

- Prior authorization requirements for in-network and out-of-network inpatient services;
- Concurrent review for in-network and out-of-network inpatient and outpatient services;
- Standards for provider admission to participate in a network, including reimbursement rates; and
- Out-of-network reimbursement rates (plan methods for determining usual, customary, and reasonable charges).

Plan sponsor takeaways

- There is no time to waste. A complaint to the Departments may trigger an examination any day now. The response time will be very short and may catch plan sponsors completely unprepared.
- Plan sponsors should start working with their claims administrators for medical, mental health, and prescription drug benefits to prepare comparative analyses.
- Plan sponsors should carefully review the information they receive from plan vendors for sufficient specificity and request additional information from the vendors, as needed.
- In reviewing the information for specificity and completeness, plan sponsors may wish to engage experts in the relevant field (e.g., clinicians with expertise in mental health, as well as medical care, and pharmacy consultants).
- Plan sponsors may need to negotiate additional terms of their agreements with the claims administrators to ensure the adequate exchange of information and assistance in analyzing mental health parity compliance. The Departments' examinations will continue and the analyses will need to be updated from time to time.
- To determine adequacy of the analysis, the plan sponsors should also review them with their legal counsel.

For more information on mental health parity compliance, please contact your Nixon Peabody attorney or:

- Yelena Gray, 312-977-4158, yfgray@nixonpeabody.com
 - Damian Myers, 202-585-8485, dmyers@nixonpeabody.com
 - Lena Gionnette, 585-263-1669, lgionnette@nixonpeabody.com
-