Health Law & Business

Employers on Hook for Mental Health Parity Despite New Target

By Lydia Wheeler and Sara Hansard

Sept. 22, 2021, 5:35 AM

- Labor Department took action against insurer
- Employers aren't relieved, attorneys say

Health insurance companies are now in the crosshairs of the Department of Labor's aggressive enforcement of mental health parity, but it's unlikely to mean employers will escape scrutiny.

In what appeared to be a first for the department, it initiated litigation last month against an insurer to ensure health plans offering mental health and substance use disorder benefits are covering treatments at the same level as physical or surgical health care.

Although the action, which was quickly settled, signaled a significant shift in the policing of parity, benefits attorneys say employers aren't off the hook.

Kathryn Bakich, who leads the national health compliance practice for benefits and human resources consulting firm Segal, said her clients still feel as though Labor will go after them to get to insurers, which serve as third-party administrators of their health plans.

"They don't necessarily have a direct line to the administrator, so they're coming after the employer who doesn't even set these policies and may not have any kind of a policy that discriminates against folks based on mental health coverage," she said.

Bakich, who is an expert on employer sponsored health coverage, has clients who are actively being audited by the Labor Department now.

In the Dark

UnitedHealthcare agreed in August to pay $15.6 million to settle claims it was being more restrictive in reimbursing out-of-network mental health services than out-of-network medical or surgical services, which included $2.5 million to settle claims brought by the Labor Department alone.

It was significant for Labor to take an enforcement action against a claims administrator or fiduciary of a health plan, said Meiram Bendat, founder and president of Psych-Appeal Inc., which helps patients challenge insurers when mental health claims are denied.

“They are the parties with essentially de facto control of the day-to-day administration of the health plans in our country,” he said, noting UnitedHealthcare, Cigna, and Aetna among the big administrators.

Because self-funded employers for the most part tend to accept what the third-party administrator, or TPA, is offering, employers are often in the dark about any potential violations, said Judith Wethall, a partner at McDermott Will & Emery, who represents employer plans.

“Sometimes a TPA does things behind the scenes that might violate mental health parity and an employer might not even know it,” she said.

That’s why some attorneys say it’s not really fair, or efficient, for Labor to go after employers unless an employer is doing something specific the claims administrator isn’t.

Public Shaming

The UnitedHealthcare settlement was the culmination of long-term negotiations with Labor for conduct that occurred prior to passage of the 2021 Consolidated Appropriations Act, which mandates that the department investigate employers for mental health parity compliance, said Kevin Malone, senior counsel at Epstein Becker & Green P.C.

The Labor Department reported its Employee Benefits Security Administration investigated and closed 180 health plan investigations in 2020, and 3,938 health plan investigations since 2011. All of the investigations described in the enforcement report were employers or other group health plan sponsors, and many were expanded to include insurers and third-party administrators, Malone noted.

The Consolidated Appropriations Act also amended the 2008 Mental Health Parity and Addiction Equity Act to require group health plans and issuers to complete an analysis that explains whether the factors used to justify non-quantitative treatment limits for mental health coverage differ from limits imposed for medical and surgical benefits.

The Labor, Health and Human Services, and Treasury departments released a list of frequently asked questions in April to clarify what the analysis must include, how it will be evaluated, and what steps will be taken if a plan is found to be noncompliant. Any group health plan or issuer found not in compliance will be named in a report to Congress.

The Labor Department will “very likely” begin publicly naming plans, “probably multiple” plans that aren’t in compliance with the mental health parity law, Malone said.

“Based on their actions with the United settlement, and based on the posture that they’ve taken, I think that they will need to make some examples of people,” he said.

Punitive Ire

Attorneys, however, say there's still confusion over what the report is supposed to look like, and some employers are having problems getting the information they need for the analysis from their plan administrators.

Many third-party administrators are not willing to provide the level of assistance self-insured employers need to provide that documentation, said Leena Bhakta, a principal legal consultant in Mercer's Regulatory Resource Group.

"I have worked with some self-insured plan sponsors where the TPA has come back and told them that 'because you're self-insured, the responsibility for preparing this documentation rests with you, the plan sponsor, and we're not willing to provide any assistance,'" she said.

Malone thinks the UnitedHealthcare settlement shows the Labor Department is at least aware that administrators hold crucial information.

"That, I think, is a good sign for the employers," he said. "It's clear that in a situation where there's pervasive practices across employers by a single administrator, the DOL is going to be directing most of their punitive ire at that administrator."

Current Labor investigations do acknowledge the administrator has the information—but that's not stopping the department from "really turning up the temperature on employers anyway," Malone said.

In the Biden administration, the department has made mental health parity enforcement a high priority, going so far as to ask Congress for additional authority to fine violators, including employers. In its fiscal 2022 budget reconciliation proposal, the House Education and Labor Committee included a provision to allow the Labor Department to impose civil monetary penalties on plan sponsors, insurers, and plan administrators.

The new analysis, coupled with the prospect of penalties, has only made employers more worried about being caught violating the law.

"No one I've spoken to is quote-unquote relieved the DOL may be going after some TPAs," Bhakta said.

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