

Legal and Regulatory Issues in Managing Behavioral Health

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Agenda

- Mental Health Parity and Addiction Equity Act of 2008
- Legal issues in management of behavioral health and substance abuse in the workplace

Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)

Formerly the Mental Health Parity Act (MHPA)

MHPAEA Goals

- MHPA Goal: parity between mental health benefits and medical benefits
- MHPAEA Goal: parity for substance use disorder benefits as well
- Not a coverage mandate

MHPAEA Benefit Definitions

- Mental Health & Substance Use Disorder benefits defined consistent with generally recognized independent standards of current medical practice
 - e.g. ICD-10, DSM-5, state guidelines
- Medical/Surgical benefits for medical conditions and surgical procedures

MHPAEA Affected Plans

- IRS, DOL and HHS administer jointly
- Self-funded group health plans, both private and governmental (non-federal)
 - Unless an exemption applies
- Health insurance issuers

MHPAEA Small Employer Exemption

- Exemption: small employers
 - Private vs. Governmental Employers
 - Different from ACA employee count

MHPAEA Other Exemptions

- 1-year exemption: increased cost
- Self-funded governmental plan opt-out

MHPAEA Parity Rules

- Parity of benefits: Mental Health (MH) and Substance Use Disorder (SUD)
 - Financial requirements
 - Treatment limitations
 - Dollar Limits

MHPAEA Financial Requirements

- Financial Requirements
 - Deductibles, co-pays, coinsurance, out of pocket maximums (not dollar limits)
 - No more restrictive for MH/SUD than for medical and surgical benefits

MHPAEA Treatment Limitations

- Treatment limitations
 - Frequency of treatment, number of visits, days of coverage, days in a waiting period, scope/duration limits
 - Quantitative and non-quantitative
 - No more restrictive for MH/SUD than for medical and surgical benefits

MHPAEA Dollar Limits

- Dollar limits
 - Annual limit or aggregate lifetime limit
 - No more restrictive for MH/SUD than for medical and surgical benefits
 - But: ACA rules on dollar limits

MHPAEA Classifications

- Classifications

- Inpatient, in-network

- Outpatient, in-network

- Emergency care

- Inpatient, out-of-network

- Outpatient, out-of-network

- Prescription drugs

MHPAEA Substantially All

- Compare classifications: financial requirements and quantitative treatment limitations
- A requirement or limitation applies to substantially all medical benefits in a classification if it applies to at least two-thirds of expected costs.

MHPAEA Predominant Level

- If a type of requirement or limitation applies to substantially all medical benefits in a classification: what is the predominant level?
- The predominant level of a limitation or requirement is the level that applies to one-half of medical benefits by cost.

MHPAEA Separate Limits

- May not track cumulative requirements or limitations separately for medical and MH/SUD

MHPAEA Disclosure

- Disclosures required, upon request
 - Criteria for determination of medical necessity (for MH/SUD benefits)
 - Reason for denial (MH/SUD benefits)

MHPAEA Penalties

- IRS: \$100/day per person affected
- CMS: \$100/day per person affected
- DOL: Correction; cause of action

Legal Issues in Management of Behavioral Health and Substance Abuse in the Workplace

Introduction

- Employer attempts to manage employees with suspected substance abuse and behavioral health issues and maintain a drug free workplace can trigger a number of laws, including:
 - The Americans with Disabilities Act (ADA)
 - The Family and Medical Leave Act (FMLA)
 - State privacy laws
 - Federal constitutional protections
 - Other state and federal laws

ADA Basics

- The ADA prohibits employers from discriminating against “a qualified individual with a disability” with respect to hiring, firing and other employment decisions

ADA Basics

- Employers are required to make **reasonable accommodation** to the known physical or mental disabilities of an otherwise qualified individual, unless doing so would impose an **undue burden** upon the company or if the employee would pose a “direct threat” to the employee or others

ADA Basics

- The ADA also contains strict privacy rules and restricts employers from making medical inquiries

ADA: What is a Disability?

- **“Disability”** under the ADA means:
 - A physical or mental impairment that substantially limits one or more of the “major life activities” of an individual; or
 - Having a record of such impairment; or
 - Being regarded as having such an impairment

ADA: What is a Disability?

- The ADA protects any individual with a disability who, with or without “reasonable accommodation,” can perform the essential functions of the employment position held or desired

ADA Considerations for Drug and Alcohol Testing

- The ADA draws a distinction between alcohol testing and drug testing

ADA Considerations for Drug and Alcohol Testing

- Drug testing is exempt from the ADA's restrictions on medical examinations, while alcohol testing is not
 - An employer may drug test applicants and current employees

ADA Considerations for Drug and Alcohol Testing

- Alcohol testing, on the other hand, is a “medical examination”
 - Alcohol testing of applicants may be conducted only after making a conditional offer of employment
 - Alcohol testing of current employees must be “job-related” and “consistent with business necessity”

ADA Reasonable Accommodation for Drug Addiction

- Drug addicts are protected as disabled individuals if:
 - they are not currently engaged in the illegal use of drugs and
 - they are participating in or have participated in a supervised drug rehabilitation program or other similar treatment program

ADA Reasonable Accommodation for Drug Addiction

- Although the employer would be obligated to make reasonable accommodation for such employees, the employer is not required to tolerate unsatisfactory behavior (e.g., excessive absenteeism or tardiness, poor job performance or accidents caused by drug use), provided that any disciplinary action is not discriminatory

ADA Reasonable Accommodation for Alcoholism

- Alcoholics, unlike drug addicts, are protected even if they currently are engaged in the use of alcohol
- An alcoholic who can perform the essential functions of his or her position is entitled to protection

ADA Reasonable Accommodation for Alcoholism

- If alcoholism adversely affects the employee's job performance or conduct, the employee may no longer be qualified and, therefore, may lose the protection of the ADA
- Regardless of whether an employee is protected, the employer may still take disciplinary action based on violations of employer policy

“Regarded as” Disabled

- Employers who take proactive steps to address what they believe to be employees with behavioral health or substance abuse issues in the workplace may face claims that they have “regarded” the employee as disabled
 - No need to accommodate employees who are not disabled but only regarded as being so
 - Employer cannot discriminate on the basis that the employee is regarded as disabled

FMLA Eligibility

- Employees who need time off from work to receive treatment for substance abuse or behavioral health, may be entitled to leave under the FMLA, if eligible
- Leave may be up to 12 weeks in each leave year
- Employee is entitled to reinstatement to the same or equivalent position at the end of the leave
- Common for employees who are facing disciplinary action for substance abuse or behavioral health to seek leave to avoid disciplinary action

Other Laws Impacting Drug and Alcohol Testing of Employees and Applicants

- Some state laws restrict the ability to conduct drug testing on employees
 - Testing of safety sensitive employees may be permitted
 - Some states require testing be done under a policy distributed to employees in advance

Other Laws Impacting Drug and Alcohol Testing of Employees and Applicants

- In the public sector, the 4th Amendment prohibition on illegal search and seizure may be implicated

Other Laws Impacting Drug and Alcohol Testing of Employees and Applicants

- Some employers are required to test some or all employees based on the industry
 - E.g., drivers subject to Department of Transportation regulations

Other Laws Impacting Drug and Alcohol Testing of Employees and Applicants

- Federal Drug Free Workplace Act, which applies to certain contractors and grantees, does not require testing but requires certain employer policies, as well as education to be provided to employees