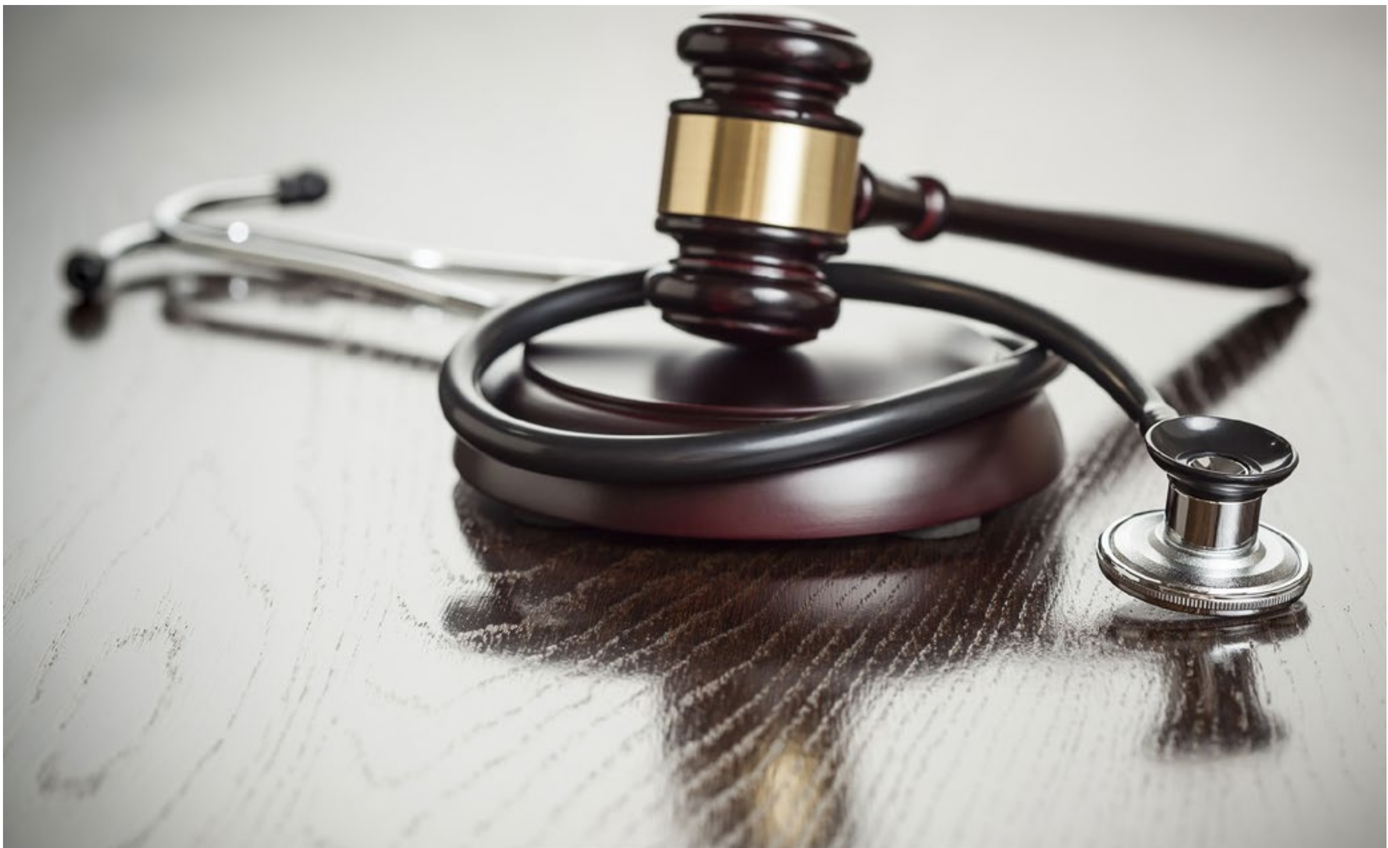

ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: Practical Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte and Washington, D.C. law firm. Ashley Gillihan, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

THE MENTAL HEALTH PARITY COMPLIANCE:

REVAMPED FOR 2017

As noted in our October Self Insurer column[1], comprehensive regulations have been issued under the Paul Wellstone and Pete Dominici Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA"), and we have seen an uptick in Department of Labor ("DOL") investigation and enforcement activity with respect to the MHPAEA. We suggested in that column that employers focus on MHPAEA compliance. This article updates activity in this area since the election and the passage of the 21st Century Cures Act in December.

Legislative Background

The MHPAEA amended Section 712 of ERISA, Section 2705 of the Public Health Services Act and Section 9812 of the Internal Revenue Code, and is designed to require true benefit parity between medical benefits for physical conditions and mental health and substance abuse benefits. The MHPAEA applies to mental health and substance abuse benefits offered in connection with group health plans.

If a plan provides medical/surgical benefits and mental health or substance abuse benefits, the plan must provide parity with respect to (i) financial requirements (e.g., deductibles, copayments, coinsurance and out-of-pocket maximums), (ii) quantitative treatment limitations (e.g., number of visits or treatments or days of coverage) and (iii) nonquantitative treatment limitations ("NQTLs")(e.g., medical management standards).

MHPAEA generally became effective for plan years beginning on or after October 3, 2009 (January 1, 2010 for calendar year plans). For years prior to 2010, the Mental Health Parity Act (MHPA), the precursor to MHPAEA, applied. MHPA's more limited equality provisions only required parity between annual and lifetime dollar limits applicable to medical benefits and mental health benefits.

We note that the MHPAEA pre-dates the Affordable Care Act (ACA). Accordingly, even if Congress undertakes to repeal and replace the ACA in 2017, a rollback of MHPAEA requirements is unlikely.

The 21st Century Cures Act

Further supporting the notion that the MHPAEA will not be affected by post-election changes, the 21st Century Cures Act (the "Cures Act"), which includes provisions relating to MHPAEA, was signed into law on December 13, 2016.

The Cures Act has a broad ranging effect on mental health issues. Of note to sponsors of employee benefit plans, the Cures Act includes a directive to the Secretaries of Labor, Treasury and Health and Human Services (HHS) to develop and issue a compliance program guidance document (the "Guidance Document") to help improve compliance with the MHPAEA, as incorporated in Section 712 of the Employee Retirement Income Security Act of 1974 (ERISA), Section 9812 of the Internal Revenue Code and Section 2726 of the Public Health Services Act (PHSA). This is intended to supplement information previously provided by the enforcement agencies.

The Guidance Document under the Cures Act would be required to include illustrative examples of previous findings of compliance and non-compliance, including:

- Examples illustrating requirements for information disclosures and nonquantitative treatment limitations; and
- Descriptions of violations uncovered during the course of investigations.

The examples will include sufficient detail to fully explain the findings, including a full description of the criteria involved for approving medical and surgical benefits and the criteria involved for approving mental health and substance use disorder benefits.

This additional information in the Guidance Document should provide valuable assistance to employers seeking to confirm compliance with the MHPAEA. This can be very important given the potential for significant liability associated with non-compliance.

Penalties

Potential enforcement actions should be cause for concern for employers and insurers, as significant penalties can result under the Code. MHPAEA violations can give rise to a $100/day/employee excise tax under Code § 4980D. Certain limitations and exceptions apply for employer sponsors of small fully insured plans as set forth in Code § 4980D.[2] In addition to the IRS taxes, participant claims may be asserted and DOL might choose to sue employers for breach of fiduciary duty based on their failure to comply with MHPAEA.

Summary

Given the potential for significant penalties, employers should focus (or re-focus) their attention on compliance with the MHPAEA. Employers should watch for issuance of the Guidance Document and use that guidance to ensure their health plans comply with the MHPAEA. This will likely require coordination with insurers and claims administrators. ■

References:

1 http://www.alston.com/advisories/mental-health-parity/pdf
2 Code § 4980D(d) provides an exemption from the excise tax for employers with between 2 and 50 employees.