A compliance handful: Compliance topics you need to know as 2022 becomes 2023

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Presented by
Rory Akers, J.D.
Vice President, Sr. ERISA Compliance Attorney
Lockton Companies

2020-2022: All of the sudden, the ERISA attorney is the most popular person in the room.

#atleastwethinkso

#willprobablyholdtruein2023

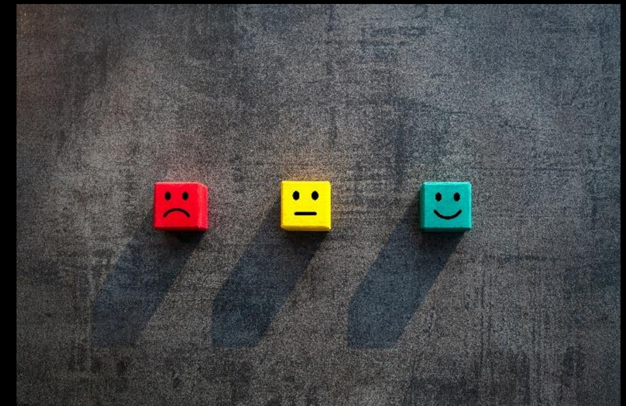
Employer's plan sponsor role

Mental health parity

Comparative analysis and DOL investigations

Mental Health Parity

- The Mental Health Parity and Addiction Equity (MHPAEA) has been around for awhile, requiring plans that offer medical/surgical and mental health/substance use disorder benefits to ensure the benefits are treated relatively the same.
- The CAA added a new level of compliance to show MH/SUD benefits are on par with medical/surgical benefits, specifically with regards to non-quantitative treatment limitations (NQTLs).
- CAA mandates that plans proactively *conduct a comparative analysis of the NQTLs* to demonstrate parity in written provisions and operations.
- The DOL is opening investigations and will continue to do so
  - DOL opened 148 health plan investigations in FY 2021, and of these 74 involved MHPAEA
  - DOL bringing on more staff to increase enforcement
  - https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/mhpaea-enforcement-2021.pdf



The problem with the NQTL analysis

- NQTLs are typically the biggest source of MHPAEA enforcement actions by the DOL as well as private litigation by participants. However, MHPAEA compliance with NQTLS is extremely difficult for plan sponsors. Why?
  - The analysis is somewhat subjective
  - Most plan sponsors adopt the carrier or TPA's policies, standards and procedures when is comes to plan administration. They don't have extensive (or any) knowledge of how the carrier is doing things in order to identify the NQTLs being applied.
- The DOL has provided some examples including red flags and FAQs to help identify types of NQTLs for plan sponsors to be on the look out for — but, arguably, it isn't enough.

DOL insight: Most DOL investigators don't have extensive knowledge (yet) of the "behind the scenes" claims processing system—participant complaints tend to drive enforcement in this area.

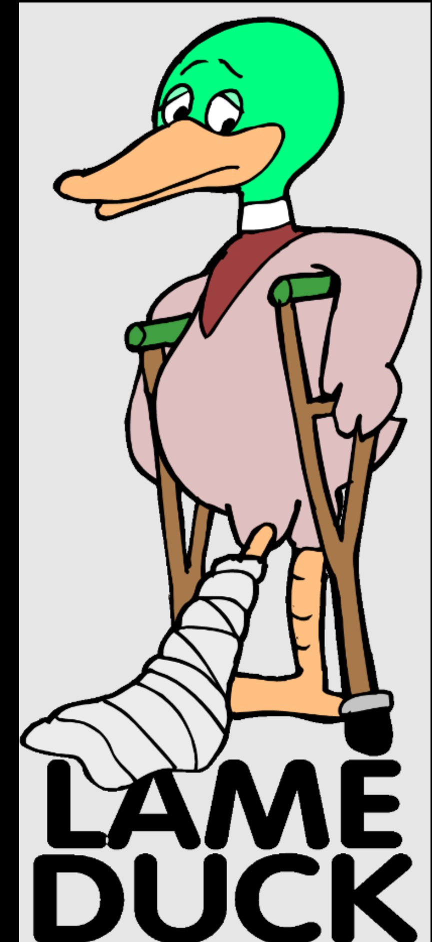
Of the 156 letters the DOL sent to plans requesting a comparative analysis, **zero(!)** *responses contained sufficient information upon initial receipt*

NQTL analysis ready & waiting: #doyourbest

- Plan sponsors will need to work closely with carrier and TPA to get this information
  - Plan sponsor, specifically self-funded plan sponsors, will want to review the information provided and see if it makes sense
    - Ask questions!
- What the DOL is wanting to see in this analysis is still not entirely clear
  - We suspect we will get more clarity as the DOL gets more clarity through the investigative process
- Prudence not perfection
  - Do your best and update as needed

Legislative and regulatory outlook

- Additional guidance is on the "regulatory agenda" for . . . this summer
  - Comparative analysis
  - Self-compliance tool updates
  - October report to Congress
- Numerous Congressional committees are working on bi-partisan legislation across a wide range of MH/SU topics including
  - Telemedicine
  - State funding for enforcement
  - Expanding liability



Transparency keep rolling

Transparency: What's already happened

Requirement	Original effective date	New date
ID cards showing cost sharing	Plan years beginning on or after Jan. 1, 2022	Deadline is not deferred; however, until guidance is issued, plans should implement the requirements applying a good faith interpretation of the law.
Continuity of care	Plan years beginning on or after Jan. 1, 2022	Deadline is not deferred; however, until guidance is issued, plans should implement the requirements applying a good faith interpretation of the law.
Accurate network directories	Plan years beginning on or after Jan. 1, 2022	Deadline is not deferred; however, until guidance is issued, plans should implement the requirements applying a good faith interpretation of the law and apply only in-network cost sharing if a member receives out-of-network care due to an error in the network directory.
Broker/consultant compensation disclosure	Applies to brokerage and consulting contracts, relating to ERISA healthcare plans, entered into, extended or renewed on or after Dec. 27, 2021	Deadline is not deferred.
Surprise billing *for out-of-network ER care, care by an out-of-network provider at an in-network facility, and care supplied by an out-of-network air ambulance provider*	• **Limiting member responsibility to in-network amounts:** Plan years beginning on or after Jan. 1, 2022. • **Arbitration process:** Plan years beginning on or after Jan. 1, 2022 • **Disclosure obligations:** Plan years beginning on or after Jan. 1, 2022	Deadlines are not deferred; interim final rules have been issued on both the limitation of member cost sharing, and on the dispute resolution process. Litigation against the latter is ongoing.
Three machine-readable files • In-network rates (the "In-Network Rate File") • Historical allowed amount data (the "Allowed Amount File") • Prescription drug pricing information (the "Prescription Drug File")	For all three files, plan years beginning on or after Jan. 1, 2022	For in-network and OON data, the deferred enforcement date is the later of the original date and July 1, 2022. For prescription drug data, the enforcement date is deferred indefinitely.**

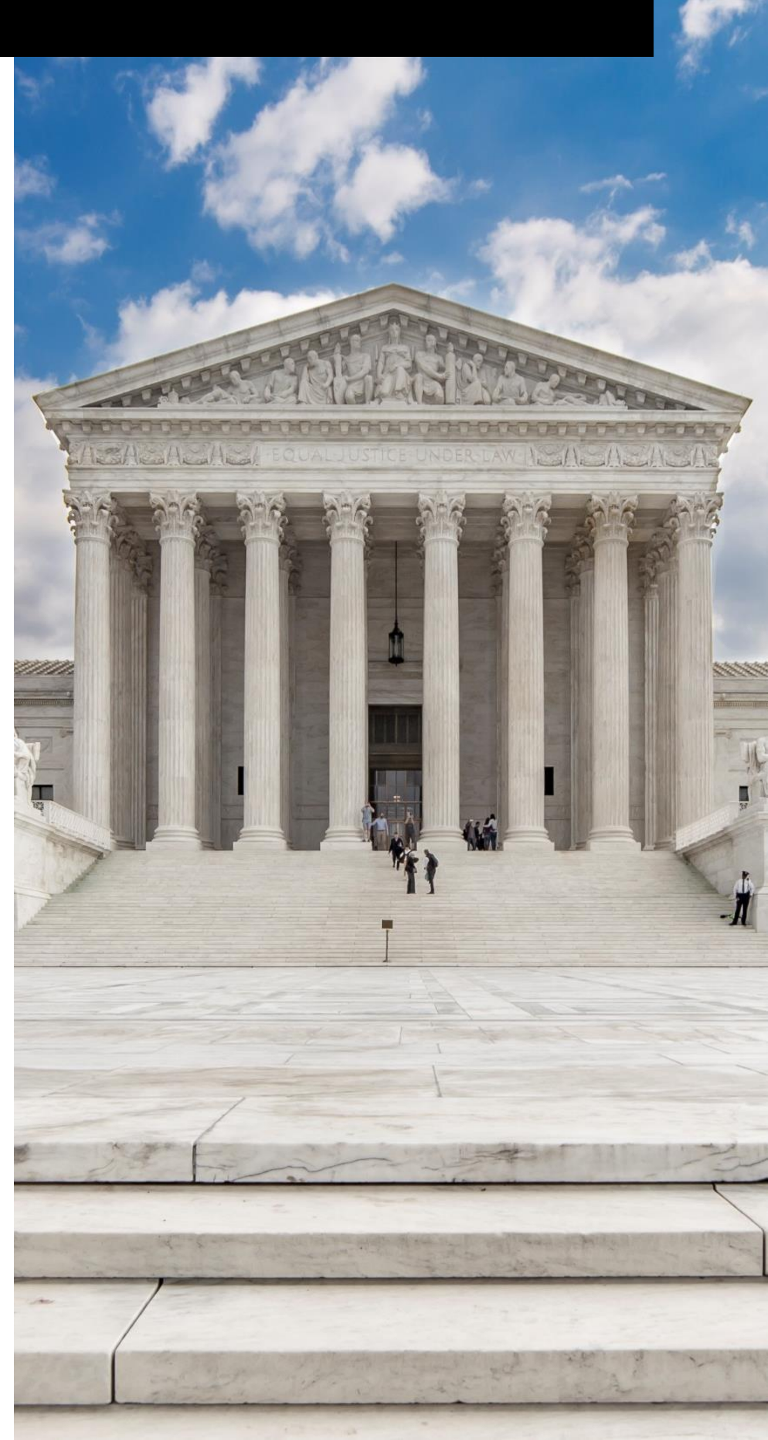
Transparency: What's coming

Requirement	Original effective date	New date
Price comparison tool Free, self-service tool, on internet website with real-time responses based on information that is accurate at the time of the request	Plan years beginning on or after Jan. 1, 2022	The deferred enforcement date is the first day of the plan year beginning on or after Jan. 1, 2023.
Advance Explanation of Benefits	Plan years beginning on or after Jan. 1, 2022	The enforcement deadline for both providers' obligations to supply the good faith estimate of charges, and plans' obligation to supply the advance EOB upon receipt of that estimate, are deferred until federal regulators issue and implement guidance.
Healthcare plan cost reporting	First filing due Dec. 27, 2021, and annually thereafter by June 1	Federal authorities did not require reporting by Dec. 27, 2021, nor will they by June 1, 2022, but expect to require the first filing by Dec. 27, 2022, reflecting relevant reportable data for 2020 and 2021.

The impact of the *Dobbs* opinion

Dobbs v. Jackson Women's Health Organization

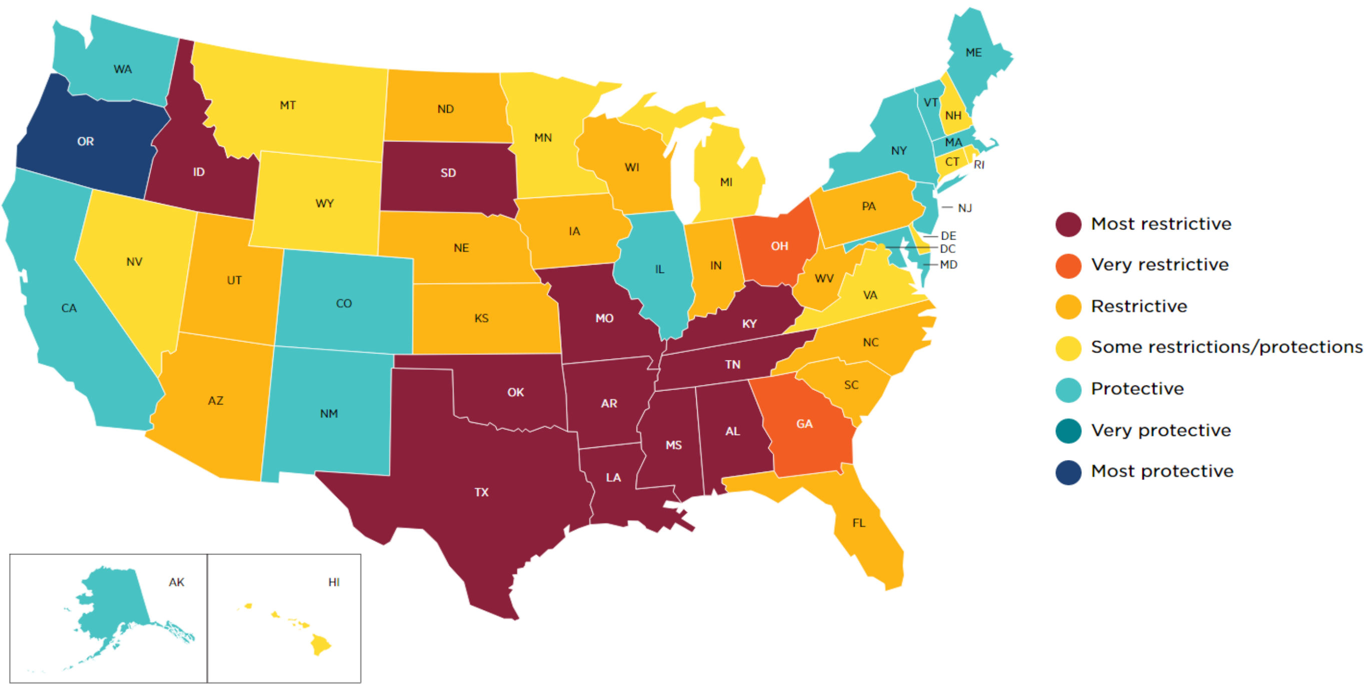
- In a 6-3 decision, the Supreme Court overturned *Roe v. Wade* and *Planned Parenthood v. Casey*, providing states broader abilities to regulate abortions within the state
  - The 1973 *Roe* opinion established a constitutional right to abortion based on the right to privacy
- What the *Dobbs* opinion did *not* do:
  - Make abortion illegal across the United States
    - States have a broad latitude to pass laws prohibiting, limiting or permitting a women's ability to obtain an abortion in the state
  - Mandate certain actions be taken by employee benefit plans



Dobbs v. Jackson Women's Health Organization

What does that mean?

States are able to pass laws that prohibit, limit or permit women to obtain an abortion in the state.



What is the reach of state authority?

- Do states have the power to regulate matters occurring outside of the state?
  - Generally speaking, state laws are not typically written to apply outside the state and the general presumption is that states cannot regulate matters occurring in other states
  - We may see states try to push the state boundary and enact laws that apply to acts outside the state, and that is likely to be challenged in court

"Some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter. For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel."

-Justice Kavanaugh

What is the reach of federal authority?

- Non-budget related legislation requires 60-votes in the Senate unless if the filibuster is eliminated or modified.
  - Codifying *Roe/Casey* or adding national abortion restrictions
  - Codifying or restricting the right to travel for an abortion
  - Legislation about provider liability
  - Expanding/restricting abortion services through telehealth
- Taxing and spending legislation can be adopted with a simple majority in both the House and Senate, subject to numerous constraints, but only once per year.
  - Whether abortion and related services are a medical expense for tax purposes
  - Tax treatment of travel expenses
  - Funding for abortion providers, crisis pregnancy centers, or awareness campaigns
- Rumored (and rejected?) options include
  - Declare a public health emergency
  - Invoke PREP Act protections to limit provider liability
  - Abortion access on federal lands

www.reproductiverights.gov

- EMTALA
- ACA contraceptive mandate
- Duty of pharmacies to fill prescriptions
- Medicaid requirements in the circumstances of rape, incest or if the patient's life is in danger

Employer considerations

- What do you want to cover with regards to abortion?
  - Coverage of abortion services
  - Prescription drugs
  - Travel expenses for those who have to leave the state to obtain services
- What states do you operate in and have employees residing in?
  - How will state law impact your benefit plan?
- How will ERISA preemption apply?
- What does the plan say?
  - Amend plan to reflect what the plan will cover, or not cover
    - *…to the extent state law permits* type language

The power of ERISA preemption

Fully insured plan

- State can regulate insurance carrier, meaning the carrier state-approved plans will comply with state laws
- Plans adopted by employers will comply with applicable state laws

Non-ERISA plan

- Non- ERISA plans, such as those maintained by a church or government, are not able to claim ERISA preemption
- Plans will be required to comply with applicable state law unless a specific exclusion is provided

Self-insured, ERISA plan

- State laws that would require an employer to amend its plan to exclude or limit cover of abortions would be preempted by ERISA
- ERISA preemption would not apply to employer operating outside the group health plan

Avenues employers can use to cover travel expenses

Medical plan

CONSIDERATIONS

- Plan document amendment might be required
- Ensure plan documents reflects extent of coverage, including any limitations
- Mental health parity compliance

HRA/FSA/HSA

CONSIDERATIONS

- Plans subject to ERISA, ACA, COBRA, HIPAA, and mental health parity laws
- Coordination with major medical plan might limit who can access the benefit
- Ensure plan document reflects any limits to benefit (i.e., dollar, occurrence, etc.)
- Excepted benefit HRA dollar limit

EAP

CONSIDERATIONS

- Are you creating a group health plan subject to ERISA, ACA, COBRA, HIPAA, and mental health parity laws?
- "Excepted benefits" considerations

Other

CONSIDERATIONS

- Taxable reimbursement, lifestyle accounts, etc.
- Taxation
- Are you creating a group health plan subject to ERISA, ACA, COBRA, HIPAA, and mental health parity laws?
- Keep the benefit broad, and not connected to medical care

ACA Section 1557 & *Bostock* implications

Discrimination based on sexual orientation or gender identity

- ACA Section 1557
  - Prohibits discrimination on the basis of race, color, national origin, sex (including sexual orientation and gender identity), age, or disability in covered health programs or activities
    - discrimination on the basis of sex to include discrimination on the basis of ***sex stereotypes***; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity. This will effectively ban covered entities from applying blanket exclusions for gender-affirming care.
  - Biden administration: "OCR will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity."
  - Applies to "covered entities"
    - Health insurance issuers and health programs or activities that receive federal healthcare dollars (think Medicare and Medicaid)

Discrimination based on sexual orientation or gender identity

- In *Bostock*, U.S. Supreme Court rules ***Title VII*** of civil rights law prohibits workplace discrimination based on sexual orientation or gender identity
  - ***Title VII*** has a broader application
- What does this mean for the benefit plans? Can a plan still include exclusion?
  - The *Bostock* opinion itself did not weigh in on the application to employer sponsored health and welfare benefit plans, but…
  - Some lower courts have applied the *Bostock* holdings to cases involving employee benefit plans, and at least one has ruled a general gender reassignment exclusion is problematic under Title VII.
- Mental health parity?
- Moral of the story: Proceed with caution…

ACA challenges, again

Braidwood Management v. Becerra.

- Judge Reed O'Connor of the United States District Court of the Northern District of Texas (the same judge who held the ACA was unconstitutional in 2018), ruled certain aspects of the ACA preventive care mandate violate the Constitution and religious freedom.
  - 2-part decision:
    - The preventive care recommendations made by the USPSTF, which become binding under the ACA as covered preventive care, violates the Constitution because the USPTF is not appointed by the President or confirmed by the Senate, but is a volunteer panel.
    - Pre-exposure prophylaxis (PrEP), an HIV drug regimen which is deemed an ACA preventive service and thus must be covered by group health plans at 100%, violates the religious freedom of the plaintiff.
- Note, O'Connor upheld other parts of the ACA preventive mandate
- What's the impact on employer-sponsored plans? Unclear at this point

COVID-19: The impact just doesn't seem to go away

COVID-19 related benefits mandates roll on, but for how long?

- COVID-19 testing, including OTC tests, must be covered at 100% by group health plans
  - For how long? Until the expiration of the public health emergency declared by *HHS, currently set to expire Oct. 2022, but apparently extended for an additional 90 days*
- COVID vaccine requirement ongoing so long as deemed an ACA preventive mandate
  - Note the vaccine mandate is NOT impacted by the emergency declaration

Feds freeze welfare plan deadlines

- The *outbreak period* marches on through Feb. 28, 2023, requiring plan sponsors to toll certain benefit related deadlines during the "outbreak period"
- Deadlines extended until the sooner of:
  - 12 months, or
  - Until 60 days following the expiration of the *presidential* national emergency declaration

Which deadlines are suspended?

- HIPAA special enrollment requests
- COBRA elections
- COBRA premium payments
- Notice by members of certain COBRA events (divorce, legal separation, child aging out)
- Claims submissions, claims appeals and requests for external review

Telehealth benefits

- Telehealth treatment can be provided at no cost, or low cost, below the HDHP deductible without impacting a participant's HSA eligibility through the end of 2022
  - Note: The allowance was effective April 1-Dec. 31
- Will it be extended?
  - Who knows…
  - Legislative action needed

Independence changes everything.

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