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Welfare Benefits 2008 Year in Review:
Bailout Bill Includes Provisions for Mental Health Parity

In October, when it seemed the sky was falling on financial institutions around the world, Congress passed the Emergency Economic Stabilization Act of 2008 ("EESA"), commonly referred to as the "bailout bill." The Bush administration's first attempt to get the EESA through Congress failed when the House of Representatives vote came up short. In order to secure enough bipartisan support for its second attempt, the EESA was loaded up with various other pieces of unrelated legislation. One such piece of unrelated legislation was the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (the "Wellstone Act").

The Wellstone Act will have a significant impact on group health plans that offer mental health and/or substance abuse benefits at different levels or on different terms than those applicable to medical and surgical benefits. The intent of the Wellstone Act is to provide true equality and parity between mental health/substance abuse benefits and other benefits covered by group health plans. The Wellstone Act does not require plans to cover mental health or substance abuse, nor does it require plans to cover one if they cover the other, but it does require plans that do offer some form of mental health or substance abuse benefit to do so on par with the medical and surgical benefits provided. Self-insured plans are also given a degree of additional flexibility in that the Wellstone Act defaults to the terms of the plan to define exactly what is a "mental health" or "substance abuse" issue, without regard to state insurance regulations that frequently define benefits in this regard.

Existing Federal Law

ERISA, the Public Health Service Act and the Internal Revenue Code already contain mental health parity provisions that apply to all large group health plans. However, the current parity law only prohibits plans from applying specific lower annual or lifetime dollar maximums to mental health benefits that are separate from the aggregate annual or lifetime maximum applicable to health benefits. The current law does not apply to substance abuse benefits at all.

Introduce the Wellstone Act

The Wellstone Act expands and amends the current parity law in several ways. First, the Wellstone Act extends the current parity law provisions applicable to annual lifetime maximums to include substance abuse benefits as well as mental health.

Second, it requires that all financial requirements under the plan with respect to deductibles, co-payments, coinsurance and out-of-pocket maximums for mental health and substance abuse benefits be the same or better than the financial requirements for medical and surgical benefits under the plan.

Third, it prohibits treatment limitations for mental health and substance abuse benefits that do not exist or that are not co-extensive with treatment limitations on surgical and medical benefits.

Fourth, the Wellstone Act requires that if out-of-network coverage is provided for medical and surgical benefits, then out-of-network options for mental health and substance abuse benefits must be covered as well.

Finally, the Act requires that the criteria for determining whether mental health and substance abuse treatment is "medically necessary" must be provided to participants and providers upon request. The Wellstone Act does not require this information to be in the SPD, though regulations that will be prescribed by the Department of Labor may include this requirement.

Wellstone Act Exemptions

For plans with more than 50 enrolled employees, like the Roofers Local 20 Health & Welfare Plan, there is only one exemption from the Act. If compliance with the Wellstone Act causes the plan's actual cost of coverage for medical, surgical, mental health and substance abuse benefits combined to increase by 2% or more in the first plan year (or 1% for each subsequent plan year), then the plan will be exempt from complying with the Wellstone Act for the following plan year. A plan may opt to discontinue compliance with the Wellstone Act at any time simply by dropping coverage of mental health and/or substance abuse completely.

In order to qualify for the statutory exemption (which would only be needed if the plan opted to cover mental health and/or substance abuse at a level or on terms different than medical and surgical benefits) the plan must take four separate steps. First, the plan must be in compliance with the Wellstone Act for at least the first six months of the plan year involved. Second, the determination that Wellstone Act compliance has increased plan costs by a particular percentage must be determined and certified by a qualified and licensed actuary in good standing with the American Academy of Actuaries. Third, the plan must file an election notice with the Department of Labor, which must include a description of the number of covered lives into the plan, a description of the actual total costs of coverage for medical, surgical, mental health and substance abuse benefits combined, and a description of the actual total costs of coverage for mental health and substance abuse separate from medical and surgical costs. Fourth, the plan must be willing to undergo an audit by the Department of Labor and/or any applicable state agency.

At first glance, this exemption raises a number of questions. Principal among those questions is whether or not the cost of complying with the exemption is less than the cost of complying with the Wellstone Act or dropping substance abuse and mental health coverage altogether. The exemption is only good for one plan year, after which the plan would need to go through the same process in order to obtain another one-year exemption. This would include complying with the six-month rule. The practical effect is that a plan would need to comply for six months to obtain the necessary actuarial determination, after which the plan could forego compliance for one year. In order to escape compliance for a subsequent plan year, the plan would again need to be in compliance with the Wellstone Act for at least another six months, leading to an on-again, off-again cyclical pattern of compliance and non-compliance. The administrative and claims experience costs involved in this cyclical pattern are likely to outweigh the cost of complying with the Act, thus making the exemption virtually useless.

Effective Date for Collectively Bargained Plans

As originally enacted, the Wellstone Act had a rather confusing effective date for collectively bargained plans, which ordinarily are given a longer period of time in which to comply than other, employer-sponsored plans. In a rider to the Worker, Retiree and Employer Recovery Act, Congress fixed which likely was a staffer's drafting error in the original legislation. Now, the effective date of the Wellstone Act is the later of (i) January 1, 2010 or (ii) the first plan year beginning after the expiration of the Collective Bargaining Agreement in effect on October 3, 2008.

What this Means for Your Plan

At the next meeting of the Board of Trustees, the Trustees should consider, in consultation with an actuary, whether or not the plan should offer mental health and/or substance abuse benefits at all. If it is determined that one or both coverages should be provided, the Trustees should consider the additional cost to the plan caused by compliance with the Wellstone Act. Then, the plan and the SPD should be amended to reflect the Trustees' decisions.

For more information about the new mental health parity rules, please contact us at your earliest convenience.

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