

Mental Health Parity Enforcement

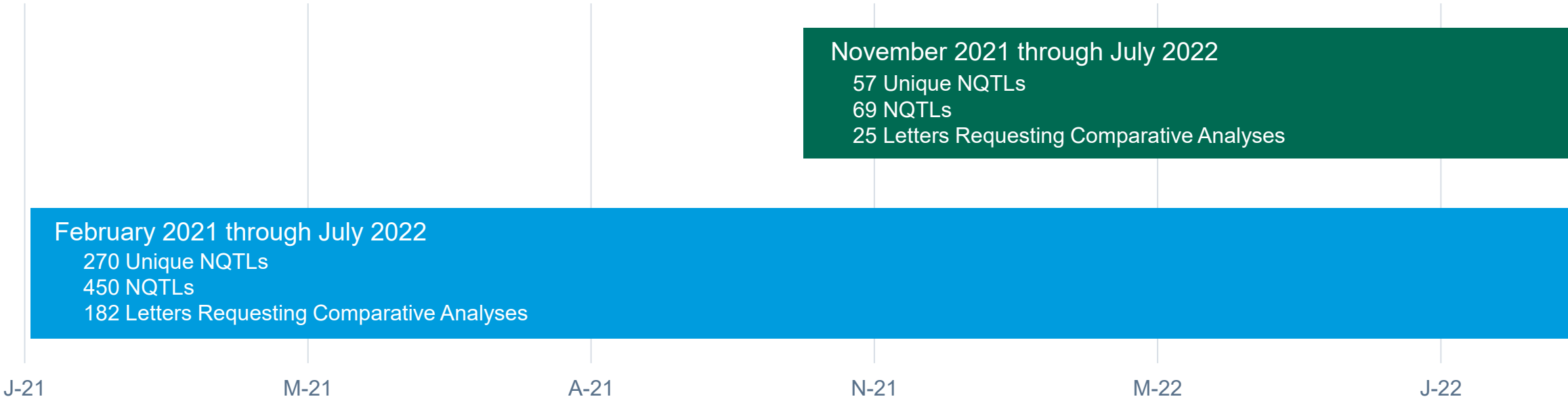
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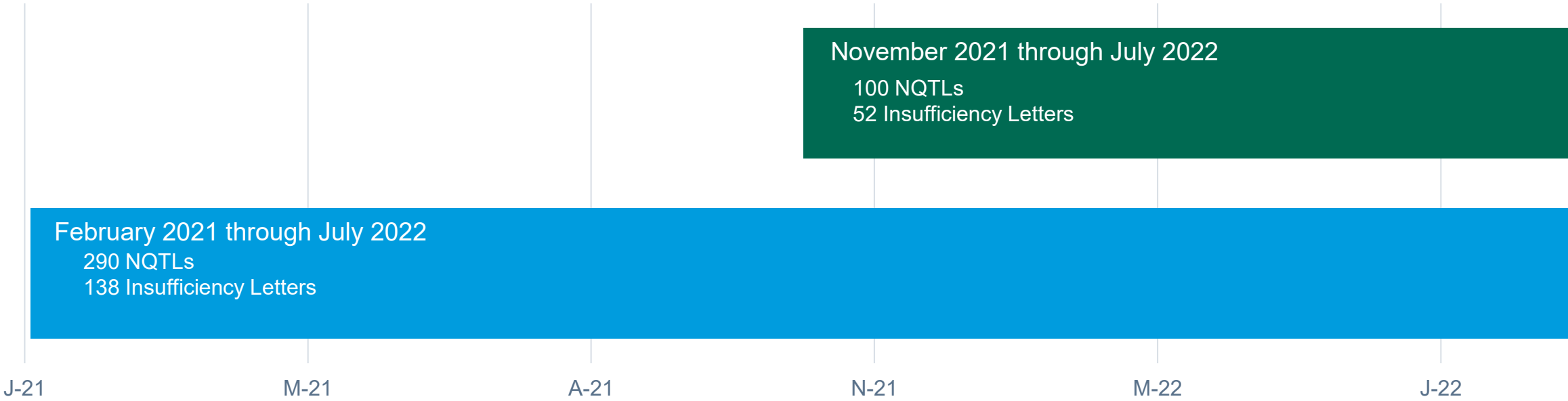
Previous MHPAEA Reports to Congress

Year	Summary
2012 & 2014	<ul style="list-style-type: none">• Overview of interim final regulations, final regulations, and related guidance• Described DOL's assistance efforts to regulated community, families, and individuals
2016 & 2018	<ul style="list-style-type: none">• Focused on DOL enforcement efforts• Described DOL measures to identify and rectify MHPAEA non-compliance and strategy to minimize future violations
2020	<ul style="list-style-type: none">• Highlighted DOL plan to utilize information from other agency partners, develop a roadmap for MHPAEA compliance
2022: Post-CAA MHPAEA Report	<ul style="list-style-type: none">• Emphasized DOL increased MHPAEA enforcement• Addressed agency experience obtaining and examining NQTL comparative analyses from plans• Addressed common issues in NQTL comparative analyses• Noted every submitted comparative analysis had deficiencies

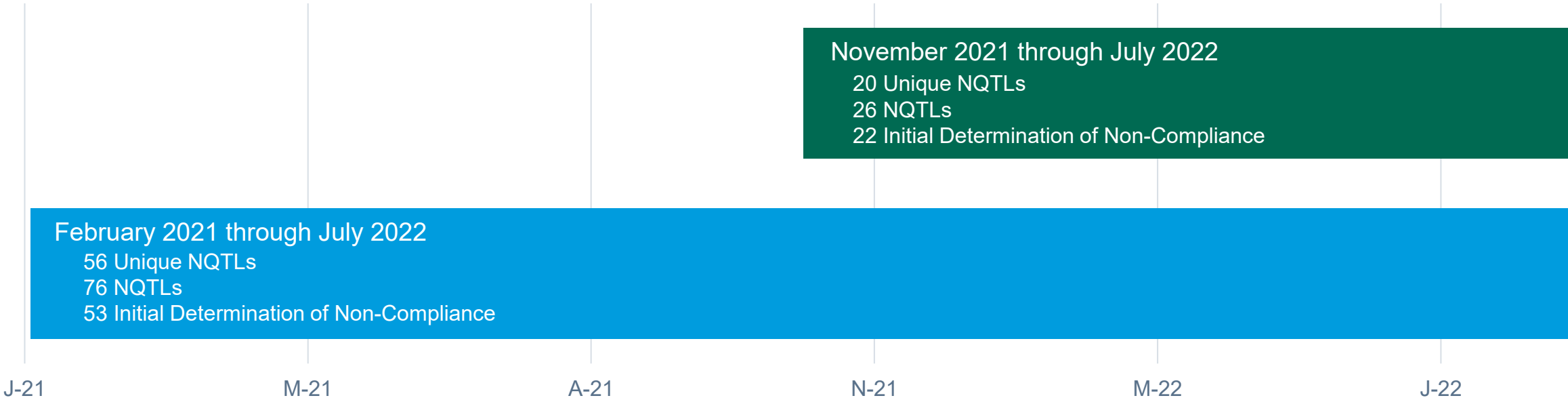
EBSA Letters Requesting Comparative Analyses



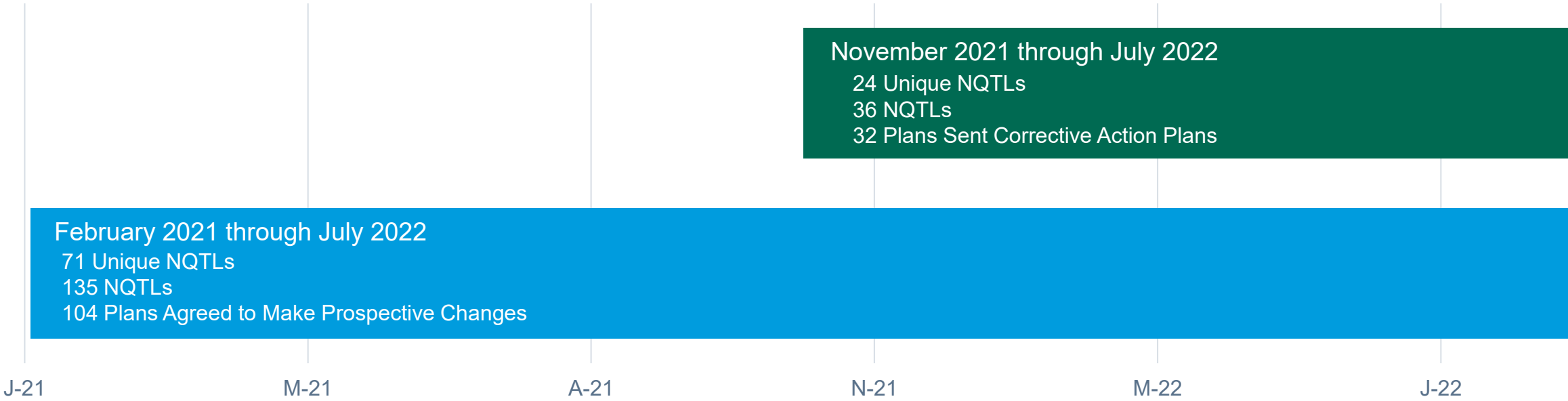
EBSA Insufficiency Letters



EBSA Initial Determinations of Non-Compliance



Prospective Plan Changes



EBSA: NQTL Enforcement Priorities

EBSA Key Areas of Focus

- Prior authorization for in-network and out-of-network inpatient services
- Concurrent care review for in-network and out-of-network inpatient/outpatient services
- Standards for provider admission to participate in a network, including reimbursement rates
- Methods for determining out-of-network reimbursement rates

NEW since January 2022 Report to Congress

- Impermissible exclusions of key treatments for MH/SUD conditions
- Adequacy standards for MH/SUD provider networks

Increased Focus on Provider Network Adequacy

- Enforcement focus on provider network composition and participation standards
- Review of provider reimbursement rates and monitoring adequacy of provider networks
- EBSA currently pursuing over 20 network admission standards investigations related to NQTLs impacting network adequacy

EBSA: Strategy and Service Provider Initiative

Target Specific Leads

- Focus on potential violations that if corrected, would have greatest impact on access to MH/SUD benefits

Service Provider Initiative

- If impermissible NQTL violation is identified, examine plan service providers to find other plans with same NQTL
- Focus on correcting violations with service providers for all plan clients – “Ripple Effect”
- During Reporting Period, EBSA worked with over 20 service providers as part of this initiative
 - Some preemptive corrections without issuing requests for comparative analyses to plan service providers or plan clients
 - EBSA currently pursuing same process with three large service providers
 - ABA therapy to treat ASD
 - Medication-assisted treatment (MAT) for opioid use disorders
 - Nutritional counseling for eating disorders

EBSA: Scope of Corrections During Reporting Period

- Complete removal of NQTL
- Change to plan document and disclosure
- Amendment to plan practices or claims processing
- Addition of coverage for previously excluded benefits
- Reduction in the scope of NQTL application to MH/SUD benefits
- Submission of complete comparative analysis, cured of deficiencies
- Re-adjudication of claims affected by impermissible NQTL, with payment of claims denied because of the NQTL
- Notice to participants and beneficiaries of opportunities to submit previously unsubmitted claims that will now be accepted for processing

Examples: Corrections for NQTLs on MH/SUD Benefits

Issue	Result	Office
Plan excluded MH/SUD benefits at residential treatment facilities but covered medical/surgical benefits at residential treatment facilities; plan did not have an explanation for the difference in coverage or a comparative analysis	Plan removed the exclusion and reprocessed previously denied MH/SUD residential treatment claims	EBSA Atlanta Regional Office
Plan required participants to use EAP before accessing MH/SUD benefits; no comparable EAP requirement to access medical/surgical benefits	Plan ended practice of using EAP as gatekeeper for MH/SUD benefits	EBSA Los Angeles Regional Office
Plan excluded telehealth MH/SUD benefits; no similar restriction on medical/surgical benefits	Plan removed MH/SUD telehealth exclusion	EBSA Cincinnati Regional Office
Plan service provider (issuer/TPA) applied prior authorization inconsistently between outpatient MH/SUD benefits and outpatient medical/surgical benefits	Provider changed claims processing system to remove prior authorization requirement for intensive outpatient MH/SUD benefits	EBSA San Francisco Regional Office
Plan excluded treatment for opioid disorder with methadone but covered methadone for medical conditions; no comparative analysis	Removed opioid treatment exclusion; reprocessing and paying wrongfully denied claims	EBSA New York Regional Office

Examples: Corrections for NQTLs on MH/SUD Benefits, Cont'd

Issue	Result	Office
<p>Service provider to several Taft-Hartley plans denied coverage of drug testing for MH/SUD conditions but allowed it for medical/surgical treatment</p>	<p>EBSA issued request to service provider plan clients*; both service provider and plan clients reprocessed claims <i>*Many plan clients unaware of service provider processing rule</i></p>	<p>EBSA Kansas City Regional Office</p>
<p>Plan excluded coverage for inpatient substance abuse disorder unless participant completed entire course of treatment; no similar provision for inpatient medical/surgical benefits</p>	<p>Following submission of incomplete comparative analysis for this NQTL, plan removed exclusion</p>	<p>EBSA Chicago Regional Office</p>
<p>Plan excluded ABA therapy benefits to treat autism spectrum disorder (ASD), but covered ASD benefits generally</p>	<p>Plan removed ABA therapy exclusion before DOL issued request for comparative analysis</p>	<p>EBSA Dallas Regional Office</p>
<p>Plan excluded ABA therapy benefits, but covered ASD benefits generally</p>	<p>Plan removed ABA therapy exclusion but included new treatment plan requirement for ABA therapy; after DOL issued request for comparative analysis for new NQTL, plan removed exclusion in lieu of submitting comparative analysis for new NQTL</p>	<p>EBSA Los Angeles Regional Office</p>

EBSA Comparative Analysis Requests: NQTLs

Type of NQTL Covered by New Requests in Reporting Period	Number of Comparative Analysis Requests Issued
Prior authorization, precertification, or prior notification	17
Exclusion of ABA, intensive behavioral, rehabilitative/habilitative, or cognitive therapy to treat MH/SUD conditions	9
Network admission standards, including reimbursement rates and network adequacy	9
Concurrent care review	7
Out-of-network reimbursement rates and out-of-network provider requirements	5
Limitations based on likelihood of improvement or progress	4

EBSA Comparative Analysis Requests: NQTLs, Cont'd

Type of NQTL Covered by New Requests in Reporting Period	Number of Comparative Analysis Requests Issued
Exclusion of medication-assisted treatment (MAT) for SUDs	3
Exclusion of speech therapy to treat MH conditions	2
Exclusion of nutritional or dietary counseling for MH conditions	2
EAP referral/exhaustion requirements	2
Fail-first requirements	2
Treatment plan requirements	2
Other	5

EBSA Challenges During the Reporting Period

Comparative Analyses Do Not Exist

- Many plans and issuers unprepared to submit NQTL comparative analyses upon request

Deficient Comparative Analyses

- **Factor Explanations:** Inadequate details on how factors were applied, definitions, and how sources were used
- **Comparability Demonstration:** Failed to demonstrate how factors were equally applied to MH/SUD and medical/surgical benefits
- **Operational Application:** Descriptions too general; lack of detail when comparing MH/SUD and medical/surgical benefits
- **Operational Data:** Missing data on NQTL's real-world application; when provided, data often lacked explanations on methodology, calculations, and numerical inputs

EBSA Initial Determination Letters by the Numbers

Type of NQTL	Number of Initial Determinations of Non-Compliance Issued	
	Total Issued Since February 2021	Issued During the Reporting Period
Exclusion of ABA therapy, cognitive, intensive behavioral, habilitative, or rehabilitative interventions to treat MH/SUD conditions	19	9
Prior authorization, precertification	10	6
Provider billing restrictions	7	0
Exclusion of medication-assisted treatment or medications for opioid use disorder	7	3
Exclusion of nutritional counseling for MH conditions	6	1
Provider experience requirement beyond licensure	4	0
Exclusion of residential care or partial hospitalization for MH/SUD conditions	3	1
Treatment plan requirement	2	0
Concurrent care review	2	1
Exclusion of telehealth/virtual visits	2	1

EBSA Initial Determination Letters by the Numbers, Cont'd

Type of NQTL	Number of Initial Determinations of Non-Compliance Issued	
	Total Issued Since February 2021	Issued During the Reporting Period
Exclusion of speech therapy for MH conditions	2	1
EAP referral/exhaustion requirement	2	1
Case manager or “care manager” requirement	2	0
Out-of-network provider reimbursement methodology/usual, customary, and reasonable (UCR) calculation	1	0
Fail-first policies	1	1
Exclusion based on likelihood of improvement or “treatability” of MH condition/SUD	1	1
Exclusion based on chronic or long-term conditions, chronicity	1	0
Formulary design	1	0
Other	3	0
Total	76	26

Deficiencies in NQTL Comparative Analyses

Common Deficiencies

- Failure to identify related benefits, classifications, or plan terms to which the NQTL applies
- Insufficient description of NQTL design and application
- Lack of detail on factors, sources, and standards used in designing and applying the NQTL
- Insufficient analysis of stringency in application of factors and standards
- Failure to demonstrate parity compliance of NQTLs as written and in operation

Common Deficiencies in NQTL Comparative Analyses, Cont'd

Common Themes in Deficiencies

- Failure to document comparative analysis before NQTL design and application
- Conclusory assertion without specific supporting evidence or detailed explanation
- Insufficient comparison or analysis
- Nonresponsive comparative analysis submissions
- Documents provided without adequate explanation
- Failure to identify the MH/SUD and medical/surgical benefits or MHPAEA classifications to which an NQTL applies
- Limiting scope of analysis to only a portion of the NQTL at issue
- Failure to identify all factors
- Lack of sufficient details about the identified factors
- Failure to demonstrate compliance of an NQTL as applied

Challenges in NQTL Comparative Analyses: In Focus

- **Issues with Explanation of Factors**
 - Failure to adequately explain how factors were applied when determining which benefits are subject to the NQTL
 - Inadequate definition of factors
 - Inadequate explanation of sources for factors
 - Failure to demonstrate comparable application of factors
- **Failure to Explain or Adequately Explain How the NQTL was Applied in Operation**
- **Failure to Demonstrate Comparable Application of the NQTL**
 - Lack of data showing results when NQTL was applied in operation
 - Failure to explain numerical inputs, underlying methodologies, or calculations behind summary data presented as evidence of comparable application
 - Failure to explain apparent differences in access to MH/SUD benefits as compared to medical/surgical benefits

Curing Deficiencies in NQTL Comparative Analyses

	Issue	EBSA Action	Response	Result
Ex. #1	<ul style="list-style-type: none"> Plan applied prior authorization requirement for inpatient facility-based care Initial comparative analysis was deficient in defining factors, identifying sources, explaining how factors were applied, and showing NQTL operational comparability 	Chicago Regional Office issued two insufficiency letters identifying information needed to assess compliance	In response, plan provided: <ul style="list-style-type: none"> Detailed information defining each factor Explanation of how it applied each factor when deciding which benefits would be subject to prior authorization Comparison data showing how NQTL applied to benefits in the inpatient classification Citations of specific journal articles plan used as sources for each factor 	EBSA found no violation and required no further info on this specific NQTL
Ex. #2	<ul style="list-style-type: none"> Plan used formula-based numerical factor when deciding which benefits would be subject to prior authorization and concurrent care review Issuer’s comparative analysis did not explain how formula was calculated or the sources and inputs used to develop the formula 	Boston Regional Office requested supporting documentation and more details	In response, the issuer provided: <ul style="list-style-type: none"> Mathematical formula used to calculate the factor Numerical thresholds used when applying the factor to benefits Table showing outcome results when applying the factor to MH/SUD and medical/surgical benefits within the benefit classification 	EBSA maintains substantive concerns about the NQTL, but issuer’s response advanced the inquiry

Biographies – Elena Lynett



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Education

Catholic University, Columbus School of Law (J.D.)

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Admissions & Qualifications

District of Columbia

Ms. Lynett is a Senior Vice President in the National Health Compliance Practice Group based in Segal's Washington, DC office and has over 15 years of experience in healthcare regulation and compliance. She provides analysis of federal and state law impacting group health plan coverage and is an expert on the Affordable Care Act, Mental Health Parity, Health Insurance Portability and Accountability Act (HIPAA) nondiscrimination and wellness provisions, and Genetic Information Nondiscrimination Act compliance.

Ms. Lynett received her JD from the Catholic University, Columbus School of Law. She received a Bachelor degree in Health Administration and a minor in Business Administration from the University of Scranton. She is a member of the Bar of the District of Columbia.

Ms. Lynett was recognized by *Employee Benefits News* as one of the 2022 Excellence in Benefits Award Winners for helping organizations prioritize mental health and substance use support.

Ms. Lynett frequently serves as an expert speaker and was a guest professor for the Georgetown University School of Law. Archives of webcasts and training she provided during her tenure with the Department of Labor are available at www.dol.gov/ebsa.

Prior to joining Segal, Ms. Lynett worked as a senior health benefits attorney for the U.S. Department of Labor's Employee Benefits Security Administration (EBSA) developing guidance and providing technical advice and training on the health provisions under Part 7 of ERISA. Prior to her career within the Department of Labor, she conducted a state and federal law compliance project for one of the nation's largest rural health plans. She also worked as a policy assistant for the United Kingdom's National Health Trust where she conducted a project related to compliance with a UK mental health law.

Biographies – Jennifer Rigterink



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Admissions & Qualifications

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Jennifer Rigterink is senior counsel in the Labor Department and a member of the Employee Benefits & Executive Compensation Group.

Jennifer focuses on a diverse array of tax and ERISA issues impacting employee benefits. Her wide-ranging practice encompasses qualified retirement plans and non-qualified arrangements, health and welfare benefits, and fringe benefit programs. She counsels single-employer and multiemployer clients on matters pertaining to plan administration, design and qualification, as well as regulatory, legislative, and legal compliance.

In recent years, Jennifer has advised employers and plan sponsors with fiduciary and governance matters applicable to defined benefit plans and pension de-risking activities, including lump sum window programs, annuity purchases, and pension plan terminations.

Jennifer frequently counsels clients on health and welfare arrangements, with a particular focus on all matters relating to family building and reproductive health care benefits. Her experience also includes working with employers and plan sponsors on mental health parity compliance issues.

Prior to joining Proskauer, Jennifer clerked for Judge Jacques L. Wiener, Jr., in the United States Court of Appeals for the Fifth Circuit and Judge Yvette Kane in the United States District Court for the Middle District of Pennsylvania.



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