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May 28, 2009

Office of Health Plan Standards
Attn: MHPAEA Comments
Employee Benefits Security Administration, Room N-5653
US Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Internal Revenue Service
CC:PA:LPD:PR (REG-120692-09), Room 5205
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Department and Service Officials:

This letter is in response to your request for information ("RFI") regarding the Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA"). My comments relate to an often overlooked but very valuable benefit provided by employers – employee assistance programs ("EAP").

My letter is divided into three parts. First, I will explain the type of EAP to which I am referring and to which my comments are directed. Second, I will recommend that for purposes of MHPAEA compliance you do not require that the EAP be aggregated with the employer's traditional group health plan providing medical and mental health benefits. Third, I will recommend that you allow employers the option of requiring its employees to use the EAP first for those services covered by the EAP (i.e., outpatient counseling) before the employee can use the mental health services covered by the employer's traditional group health plan.

Part I – Employee Assistance Programs

EAPs come in many shapes and sizes. Some EAPs are referral-only EAPs, in which case if properly structured, existing guidance from the Department provides that such an EAP will not be an ERISA employee welfare benefit plan. (See, ERISA Opinion Letter 91-26A.) These types of "referral-only" EAPs are excluded from this comment letter.

However, if an EAP offers at least one assessment/counseling session, then such an EAP will be an employee welfare benefit plan under ERISA. (See, ERISA Opinion Letters 83-35A and 88-04A.) If

an EAP offers at least one assessment/counseling session, it will also be a group health plan subject to the MHPAEA requirements. (See, ERISA Section 733(a)(1) and Code Section 9832(a).)

A typical EAP offers on average three assessment/counseling sessions per incident, and some EAPs of large employers will offer up to eight sessions per incident. However, even though EAPs provide services that are considered medical care, most EAPs are much broader. The typical EAP will also offer other services that can assist employees in the time of need, including services relating to financial concerns, daycare for children and adults, parenting issues, retirement anxiety and layoffs. Coupled with the fact that EAPs are confidential and separate from the employer, over the years the EAP has become the "first responder" or "gatekeeper" for any employee concern. Employers have become very successful at promoting their EAPs for this purpose by publishing the EAP's phone number on employee bulletin boards, employee newsletters and other employee communications. An employee at almost any company that has an EAP knows how to contact the EAP, that the EAP will address almost any concern the employee may have and that such contact will be kept strictly confidential.

In addition to the explanation above, a few other facts regarding EAPs are important to note:

- **Broad Eligibility.** Because an EAP is structured as a "first responder" or "gatekeeper," most employers allow all employees and their immediate family members to receive services. This is true even if a group of employees, such as part-time and temporary employees, are not eligible for the employer's traditional medical plan. Thus, if an employer only allows employees working at least 20 hours per week to participate in the employer's traditional medical plan, the employer will typically still allow any employee, regardless of hours worked, to receive EAP services.
- **Fully-Paid Benefit.** The typical EAP is a self-insured benefit that is provided by a third-party vendor. All benefits are typically paid 100% by the employer, with no co-payment or co-insurance by the employee. Further, other than a limit on the number of sessions per incident, there typically are no lifetime or annual financial limits, and benefits/limits are not coordinated with the employer's traditional medical plan.
- **Network Only Benefit.** EAP benefits are provided through a network of assessment counselors and mental health professionals. Out-of-network, inpatient and prescription drug benefits are usually not offered by an EAP.

Part II – No Required EAP Aggregation

Background: Proposed regulations provide that all medical care benefits provided by an employer constitute a single group health plan, unless it is clear from the documentation that the benefits are provided under separate plans and the benefits are operated as separate arrangements. However, if the principal purpose of establishing separate plans is to evade any requirement, including MHPAEA, then the separate plans will be considered a single plan. (See, Prop. Labor Reg. Section 2590.732(a)(2)(i) and Prop. Treas. Reg. Section 54.9831-1(a)(2)(i), the "Proposed Regulations").

Because most EAPs are ERISA plans, many employers consider them a supplement to their traditional medical plan. In addition, as a cost-saving measure, many employers have also adopted a single ERISA plan that provides medical, dental, vision and EAP coverage. Thus, these employers will have a single ERISA plan document for all health coverages and file a single Form 5500 for all such health coverages. However, the plan document and SPDs will make it clear that the medical, dental, vision and EAP coverages are separate and distinct coverages within such single, omnibus ERISA plan.

As explained below, it will be difficult, if not impossible, for many EAPs to comply with MHPAEA if they are aggregated with the employer's traditional medical / mental health benefits. Concern has been raised that an employer could not simply structure an EAP as a separate ERISA plan, because under the mandatory aggregation language in the Proposed Regulations such a structure could be seen as attempting to evade the application of MHPAEA.

Recommendation #1: We recommend that the MHPAEA guidance does not require the aggregation of an EAP and an employer's traditional medical plan. We further recommend that the Proposed Regulations be revised to not require mandatory aggregation for EAPs in this respect.

Recommendation #2: In order to effectuate recommendation #1, we further recommend that the Proposed Regulations be revised so that it is clear that an EAP can be operated as a separate arrangement, while still being part of the same ERISA plan.

Analysis #1: If an EAP is required to be aggregated with an employer's medical plan, then the combined plan will include medical/surgical benefits. This would mean that the EAP (as part of the combined plan) will be considered to offer medical/surgical benefits and the MHPAEA requirements would apply. The financial requirements of MHPAEA (e.g., deductible and annual maximum parity) should not be an issue, because as explained above most EAPs pay 100% of the benefit.

However, treatment limitation parity will present a problem. As explained above, most EAPs limit coverage to a set number of sessions per incident. This appears to violate the treatment limit parity requirements in a combined plan. Further, even if one could argue that the employer's traditional mental health benefits, which presumably would have no treatment limits after MHPAEA (or otherwise would have treatment limits in compliance with MHPAEA), could be considered the same arrangement for purposes of satisfying the treatment limit parity requirement, the fact that the EAP and the employer's mental health benefit will have different co-payment and/or co-insurance structures would not weigh in its favor. In other words, because the EAP will pay at 100%, and the employer's mental health benefits will pay at a lower percentage (e.g., 80%) that is in parity with the medical benefits, employees will always tend to use the EAP benefits first. Because those benefits are limited to a specific number of sessions, the treatment limit parity requirements appear to be violated.

In addition, an EAP does not provide access to out-of-network providers. In fact, access to out-of-network providers in an EAP does not work due to the assessment nature of the EAP. When most employees call, they are not certain many times what the real problem or issue may be, thus an EAP

assessment counselor discusses the issues with them to make certain that they are scheduled with an appropriate professional. Sometimes there are multiple issues to address and thus more than one professional is needed (e.g., a financial counselor, plus a mental health professional relating to stress). Further, because employers want employees to use the EAP service, they pay those benefits at 100%. However, in order to control costs, only network providers are used. If out-of-network providers were used, employers could not control the efficacy and cost associated with those providers and therefore they would likely need to institute co-insurance which would defeat the purpose of encouraging employees to utilize EAP services.

Thus, if EAP benefits were required to be aggregated with the employer's medical benefits, problems relating to treatment limit parity and out-of-network parity would arise. To solve these problems, many employers would be forced to restructure their existing EAPs to the point where some employers may simply stop offering EAPs because the aggregation issues are simply to difficult to surmount. Alternatively, other employers may need to vastly scale back their EAP (such as removing all health related services or adopting only a referral only EAP). For these reasons, we recommend that EAP benefits not be required to be aggregated with an employer's medical benefits, and that the Proposed Regulations be revised to not require mandatory aggregation in this respect.

Analysis #2: The Proposed Regulations provide that in order for an EAP benefit to be considered separate from the employer's medical benefit, the documentation must be clear that the EAP is being provided under separate "plans." It is unclear whether the term, "plan," refers to "group health plan" in Labor Reg. Section 2590.732(a)(1) and Treas. Reg. Section 54.9831-1(a)(1) or whether it refers to an ERISA plan. As set forth above, many employers do not structure their EAP as a separate ERISA plan, but rather consider it as just another type of health coverage under their single, omnibus ERISA health plan that provides medical, dental and vision options. Therefore, so that employers do not need to establish separate ERISA plans for their EAPs (and thus incur additional costs in the process) just for this purpose, we recommend that the Proposed Regulations clarify that the documents can provide that the EAP benefits are provided pursuant to a "separate plan or separate coverage option under the plan." Because the second prong of the requirement is that the arrangements must be operated as separate arrangements, you will always insure that regardless of the documentation (i.e., separate plan or separate coverage option), the EAP benefits will always be operated pursuant to a separate arrangement.

Part III – Allow EAPs to Fulfill their Traditional Role

Background: MHPAEA requires parity with respect to financial and treatment limits and out-of-network providers. MHPAEA does not appear to require parity with respect to eligibility.

Recommendation: We recommend that you allow employers the option of requiring employees who are eligible for the employer's medical/mental health benefits to utilize the EAP first with respect to those benefits covered by the EAP (i.e., outpatient counseling services).

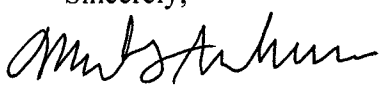
Analysis: As explained above, EAPs have traditionally acted as a "first responder" or "gatekeeper" to any employee concern. Due to the assessment function of an EAP, the EAP is able to assess an

employee's issues and quickly get the employee the help that he/she needs. Further, the EAP's entire structure is geared toward facilitating its use by having the service be confidential, paying at 100%, and typically covering all employees of an employer. Thus, in the past, many employers have thought that the EAP is where employees turn to first for outpatient counseling services and may have also publicized that employees should call the EAP first due to its assessment / gatekeeping function. However, until now many employers have not required employees to use the EAP first, before the employee can use the employer's mental health benefits under its medical plan.

After the passage of MHPAEA, employers are considering different alternatives for structuring their EAPs and medical / mental health benefits in ways that maximize the benefits in an efficient manner, that further their goal of providing assistance to employees, and that are cost-effective. One of these methods is to require employees to first use the EAP for its assessment / gatekeeping function. This assessment may take one session or may take multiple sessions depending on the issues involved. However, once that assessment is complete, the person is either referred to a mental health professional which is then covered by the employer's mental health benefits or remains within the EAP up to the EAP's maximum session limits (e.g., this may occur if the employee is a part-time employee and is not eligible for the employer's medical / mental health coverage, or the employee has non-mental health issues). This requirement should not violate MHPAEA, because it is similar to an eligibility rule which MHPAEA does not regulate. Further, this requirement will also assist employees because it will make certain that employees receive assessment services up front and allow EAPs to function as they traditionally have in the past and as employees have come to expect.

Thank you for your consideration of these recommendations, and if you have any questions, please feel free to contact me.

Sincerely,



Mark L. Stember

cc: Amy Turner
Russ Weinheimer