THE ERISA INDUSTRY COMMITTEE

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Advocating the Benefit and Compensation Interests of America's Major Employers

Health/Legislative Analysis

MENTAL HEALTH PARITY UPDATE
Senate Vote Expected Soon
July 12, 2004

I. EXECUTIVE SUMMARY

- Mental health parity legislation aims to stop health plans from discriminating against mental health conditions by requiring plans to cover mental health benefits on par with medical and surgical benefits. In 1996, Congress enacted the Mental Health Parity Act (MHPA), which is more limited in scope and does not compel insurers to provide full-parity coverage. For group plans that choose to offer mental health benefits, the MHPA requires parity only for annual and lifetime dollar limits on coverage.

- The "Senator Paul Wellstone Mental Health Equitable Treatment Act of 2004" (S.486) referred to as the Domenici-Kennedy Bill, introduced by Sens. Pete Domenici (R-NM) and Edward Kennedy (D-MA), is an attempt to close loopholes from the MHPA by also barring group health plans from requiring higher copayments, deductibles, and coinsurance payments for mental health services and discriminating against length of hospital stays and number of outpatient visits.

- Even though the bill would raise health insurance costs, the legislation has received positive endorsements from the Executive and Legislative branches, receiving an endorsement from President Bush, and garnering 69 and 245 co-sponsors from the Senate and House, respectively. With the bill's large number of co-sponsors in the Senate and House, the bill should proceed as a stand-alone and not as an amendment to another priority spending bill.

- Senate Majority Leader Bill Frist (R-TN) made a decision to "hotline" the Domenici-Kennedy Bill on June 23, 2004. "Hotlining" indicates that the Senate leadership will likely bring the bill to the Senate floor for a vote in the near future if there are no objections to the bill.

- Senate Leadership is working on a unanimous consent agreement that will most likely contain the Domenici-Kennedy Bill substitute amendment, an amendment offered by Senator Judd Gregg (R-NH), an agreed time for debate, and a full Senate vote. The Gregg Amendment allows employers to opt-out of compliance with the legislation if their costs increase by one percent (1%) or more.

II. CURRENT LAW

The mental health parity legislation seeks to prevent health plans from discriminating against mental health conditions by requiring plans that cover mental health to provide coverage equal to medical and surgical benefits. In 1996, Congress enacted the Mental Health Policy Act (MHPA), that required group plans, choosing to offer mental health benefits, a parity only for annual and lifetime dollar limits on coverage. The law also states that a plan without an annual or lifetime dollar limit on medical and surgical benefits may not impose such a dollar limit on mental health benefits offered under the plan. The MHPA applies to most group plans with more than 50 workers. A one-year extension of the MHPA set to expire on December 31, 2004 has already passed the Senate and House in separate legislation.

III. WHAT THE DOMENICI-KENNEDY BILL REQUIRES FROM EMPLOYERS

The Domenici-Kennedy Bill attempts to close loopholes in the 1996 law by barring group health plans from requiring higher co-payments, deductibles, and coinsurance payments for mental health services. In addition, the legislation does not permit group health plans to set different treatment limitations in such areas as the number of outpatient visits and the length of hospital stays. The bill is applicable to group health plans with future and existing mental health benefits and is patterned after the mental health benefits provided through the Federal Employees Health Benefits Program (FEHBP).

There has been much debate over the vexing and broad definition of mental illness in the bill. Originally, the bill defined mental health benefits as all conditions listed in the fourth edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV). The Domenici-Kennedy Bill's proposed substitute amendment removes the aforementioned references, providing more flexibility for employers that have to comply with the law. The bill explicitly states that the legislation may not be construed: to mandate plans to provide any health benefits (mental health benefits are voluntary but once offered must have parity – all or none); to prevent mental health benefits' medical management; or require the provision of specific mental health services, except to the extent that failure to provide such services would result in disparity between the coverage of mental health and medical/surgical benefits.

There is also no requirement that a plan must use any willing provider for mental health benefits. In addition, the legislation does not require mental health benefits coverage related to drug and alcohol abuse.

An issue still being debated is the Secretarial Authority Section (p. 10 line 5 to line 14) stating that the Secretary would have the ability to propose additional restrictions in relation to the imposition of financial or treatment restriction on mental health benefits where similar restraints are not imposed with respect to the medical and surgical benefits. Senator Gregg's Amendment strikes this section due to the uncertainly in encouraging the Secretary of Labor to go beyond the

requirements outlined in the bill. Finally, the bill grants exemptions to companies with fewer than 50 employees and will become effective January 1, 2006.

IV. REMAINING EMPLOYER ISSUES

The Domenici-Kennedy Bill's substitute amendment has some remaining problem areas from the employer prospective. These issues are: 1) lack of clear federal preemption; 2) lack of protection for medical management practices; 3) an ambiguous parity test; 4) no protections from loss of health coverage or increased costs; 5) lack of a sunset provision; 6) bill should not apply to federal or state mandated mental health coverage; and 7) the bill should not apply to out-of-network benefits.

The federal preemption standard fails to establish a uniform requirement for health plan enrollment and thus creates a range of costly and conflicting state and federal requirements. Section (a)(8) of the bill will give the Secretary of Labor broad authority to issue regulations restricting medical management of mental health services, thus interfering with health plan practices. While the inclusion of the "specific services" rule of construction is beneficial, the lack of clarification of the "disparity" standard raises uncertainty. Furthermore, under the rules of construction, the threat of lawsuits is present with anything less than expert authorization for excusing psychotherapy and counseling. Although the vagueness of the bill's general parity rule was corrected, there is still a need to address the benchmarking issue.

The bill also lacks any form of protective provisions for employers or employees in unfavorable consequences resulting from the legislation. These consequences include more restrictive coverage and increased health care costs. The bill lacks inclusion of an appropriate sunset provision, which was included in the MHPA.

Moreover, the bill should not pertain to any federal or state mandated mental health coverage requirements. The provisions should only apply to voluntarily provide mental health services. The draft bill would also require out-of-network mental health benefits to meet parity requirements unless a plan provides "reasonable access to in-network provider and facilities."

V. GREGG AMENDMENT

The Gregg Amendment, planned by Senate HELP Committee Chairman Judd Gregg (R-NH) is the only likely floor amendment beyond the Domenici-Kennedy's substitute amendment. The Gregg Amendment would enable employers to opt-out of compliance with the legislation if it raises their costs prospectively and retrospectively by one percent (1%) or more. Therefore, the Gregg Amendment would protect employers and employees from potentially excessive cost increases resulting from the changes in health coverage required by the Domenici-Kennedy mental health parity bill. S. 486.

Within the amendment there is a strike of the secretarial authority section eliminating the Secretary of Labor's ability to propose additional restrictions on financial or treatment limitations on mental health benefits where similar limitations are not imposed with respect to the medical and surgical benefits.

VI. LEGISLATIVE AND EXECUTIVE OVERVIEW

President Bush expressed support for mental health parity in an April 2002 speech and established the New Freedom Commission on Mental Health. He did not publicly spell out details of legislation he would support and has made no major mention of the issue since. The current House and Senate bills are strongly supported by advocates for the mentally ill and have broad, bipartisan support in Congress. Domenici and Kennedy's legislation has 69 co-sponsors, enough support to overcome objections, once scheduled for a vote. In the House, companion legislation entitled the "Paul Wellstone Mental Health Parity Act," H.R. 953, offered by Reps. Patrick. J. Kennedy (D-RI) and Jim Ramstad (R-MN), has 245 co-sponsors. House Leadership has not been supportive of H.R. 953 and has thus far prevented a House floor vote on the bill.

Full-parity legislation was first introduced in the 107th Congress. Recently, the Domenici-Kennedy Bill was discharged from the Senate Health, Education, Labor & Pensions Committee (HELP) without any agreement or vote, therefore allowing the bill to move to the Senate floor. Similar parity legislation passed the Senate in August 2001 and was attached to an unrelated spending bill that was rejected by the House in December 2001.

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