California Strengthens Mental Health Parity Law

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PROFESSIONAL

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California just passed a law expanding parity requirements for mental health coverage. Hooper, Lundy & Bookman P.C. attorneys look at what will be required of disability insurers and health plans as of Jan. 1, 2021, and predict an uptick in related litigation and regulatory enforcement.

Gov. Gavin Newsom (D) recently signed a number of bills to expand access to quality behavioral health care for Californians, including SB 855, which aims to remediate gaps and flaws in the California Mental Health Parity Act and is expected to significantly expand insurance coverage for mental health conditions.

Supporters of SB 855 claim that its passage provides the most dramatic expansion of mental health and addiction coverage under state law in decades. Indeed, some of the sponsors have opined that this law places California as the nation's leader on mental health and addiction law.

It is yet to be seen how insurers and health plans might try to limit SB 855's scope and application. We can, at least, expect increased litigation and regulatory enforcement based on SB 855 in the near future.

Key Provisions Based on Court Ruling

California's prior mental health parity law, enacted more than 20 years ago, did not apply, for example, to all mental health conditions nor to substance use disorders. Additionally, there were ambiguities in the definition of "medically necessary treatment" and level of care criteria. These issues and others were litigated in *Wit vs. United Behavioral Health* (N.D. Cal. Feb. 28, 2019).

SB 855 adopts key findings made by the *Wit* court in its ruling, which was hailed in mental health circles as an important rebuff to insurers' use of restrictive review criteria to deny meaningful parity to mental health coverage.

The new law takes effect on Jan. 1, 2021, and applies to California health-care service plans and disability insurers. Highlights include:

- Requires coverage of the full range of mental illnesses and substance use disorders identified in the most recent versions of the American Psychiatric Association's Diagnostic and Statistical Manual (DSM).
- Requires coverage of "medically necessary treatment" and that "medical necessity" determinations be consistent with generally accepted standards of care applied in mental health and substance use disorder care.
- Requires health plans and insurers to use specified clinical criteria and guidelines for level of care determinations and prohibits the application of additional, different or conflicting criteria.

- Prohibits limiting benefits or coverage for mental health or substance use disorders to short term or acute treatment.
- Prohibits denying medically necessary services on the basis that they should be or could be covered by a public entitlement program.
- Provides for administrative or civil penalties by the Department of Managed Health Care (DMHC) or the Department of Insurance (DOI).

SB 855's Impact on Delivery of Mental Health Treatment

California law will now mandate coverage for medically necessary treatment of mental health and substance use disorders, under the same terms and conditions applied to other medical conditions.

Importantly, the bill broadly defines "medically necessary treatment of a mental health or substance use disorder," and requires that medical necessity determinations (as well as utilization review criteria) be consistent with generally accepted standards of care and clinical practice recognized by health care providers practicing in relevant clinical specialties.

Specifically referencing the *Wit* litigation, SB 855 will now require health plans and insurers to use specified clinical criteria and guidelines for level of care determinations and will prohibit the application of additional, different or conflicting criteria not tied to industry standards. And, the new law will prohibit health plans or insurers from limiting benefits or coverage for mental health or substance use disorders to short term or acute treatment.

Further, the new law also prohibits provisions in health plan contracts that "have the effect of conferring discretion on a health care service plan or other claims administrator to determine entitlement to benefits or interpret contract language that, in turn, could lead to a deferential standard of review by a reviewing court."

To be impactful, there also has to be monitoring and enforcement of mental health parity laws. SB 855 authorizes DMHC or DOI, as applicable, to assess administrative or civil penalties for violations of the new requirements. Further, with respect to health plans, existing law provides that willful violation of the mental health parity law is a crime.

In addition to regulatory enforcement, individuals can file administrative grievances directly with the health plan or insurer, or potentially civil actions, for denials of coverage. While SB 855 does not provide for a private right of action for any alleged violations, individuals, on behalf of themselves or a class of similarly situated individuals, can pursue relief under existing law, such as California's unfair competition law, or through a claim for breach of contract or breach of the implied covenant of good faith and fair dealing, depending on the particular facts of the case.

Providers may similarly be able to bring claims on behalf of their patients as authorized representatives, with a valid assignment. However, it is a more nuanced question whether providers could have independent standing to sue for violations of the mental health parity act.

Finally, SB 855 also places affirmative obligations on health plans and insurers, requiring them to monitor clinical review criteria and utilization review decision making, and to sponsor formal education programs to educate their staff, contractors, participating providers, and beneficiaries regarding clinical review criteria. The health plans and insurers must also provide, at no cost, the clinical review criteria to providers and insured patients.

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