

Restrictive Employment Agreements (Noncompetes) & Fiduciary Compliance

“INNOVATIONS IN INSURANCE”

NABIP-CK Chap. SYMPOSIUM (3/5/2024)

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Biden's Executive Order: Labor Market Competition

“[A] competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage. . . .”

- “[Corporate c]onsolidation has ma[de] it harder for workers to bargain for higher wages and better work conditions. Powerful companies require . . . non-compete agreements that restrict the[] ability to change jobs. . . .”





Biden's Executive Order: Labor Market Competition

“[A]ll agencies shall consider. . . .”

- “[E]nforc[ing] the antitrust laws fairly and vigorously. . . .”
- “Better protect[ing] workers from wage collusion,. . . [and the FTC/DOJ] to consider whether to revise the Antitrust Guidance for Human Resource Professionals”
- “[T]he ... FTC is encouraged to ... exercise statutory rule making authority ... to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.”



"Whole-of-Government Effort" to "Improve Competition for American Workers"

U.S. Treasury Department, *The State of Labor Market Competition* (3/7/2022)

Biden's 7/2021 Executive "Order outlined a whole-of-government approach to addressing the excessive concentration of labor markets ... [and] directed the Secretary of the Treasury, in consultation with the Attorney General, the Secretary of Labor, and the Chair of the FTC, to produce a report on the effects of lack of competition on labor markets." (p. 1)

The "Executive Order ... establish[es] a whole-of-government effort to ... improve competition for American workers, consumers, and small businesses. Pursuant to this Order, federal agencies are acting to develop and implement several proposals to promote competition in labor markets." (p. 51)



Refresher: Types of Potential “Restrictive Employment Agreements” and their Differences

- Non-competition agreements
- Non-solicitation agreements
- No-recruit agreements
- No-business agreements
- No-poach agreements
- Confidentiality agreements (e.g., NDAs, trade secrets, etc.)
- Training re-payment agreements
- Payment-for-competition (i.e., pay-to-compete) agreements



FTC's Proposed Ban on Non-Compete Agreements

- Proposed NPRM on 1/5/2023 after two cases brought on 1/4/2023
- FTC's proposed ban of non-competes is not surprising
 - Biden's 7/2021 speech and U.S. Treasury Dept.'s 3/22 publication; appointment of Lina Kahn to chair the FTC
 - FTC Com'r R. Chopra & L. Kahn, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. of Chic. L. Rev. 357, 373-74 (2021) (discussing how non-compete agreements are ripe for FTC rulemaking)



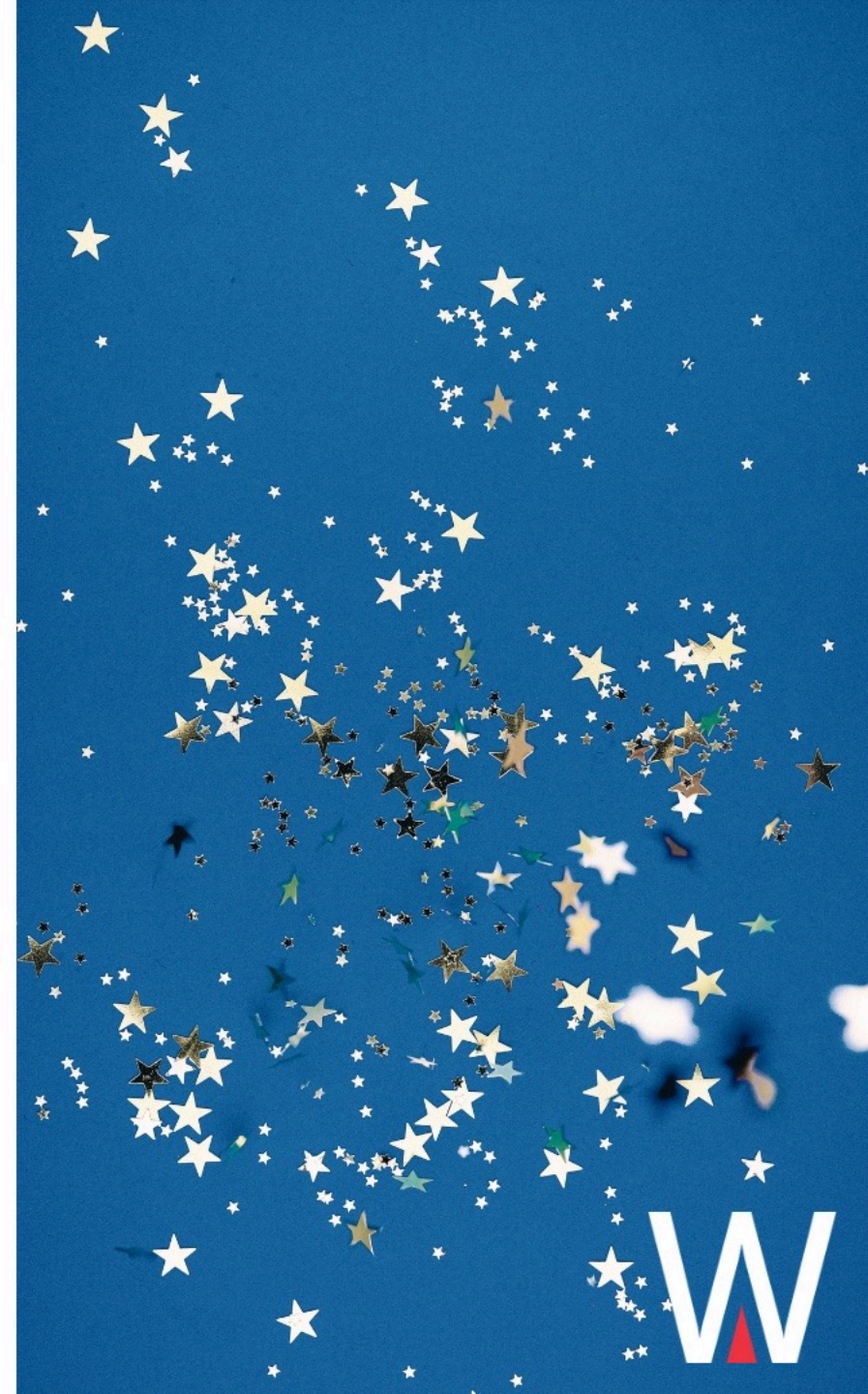
FTC's Proposed Ban on Non-Compete Agreements

- **FTC Hearings**

- *Competition and Consumer Protection in the 21st Century (10/2018, 6/2019)*
(discussing noncompetes and inviting public comment on noncompetes and their use as inconsistent with antitrust law)
- *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues (1/9/2020)*
- *Making Competition Work: Promoting Competition in Labor Markets (12/2021)*

- **FTC Solicitation for Public Comments on Contract Terms that May Harm Competition (8/5/2021)**

- **Multiple FTC press releases focusing on noncompetes in merger reviews**





Public Comments

- **Approximately 29,000 comments received**
 - Chambers of commerce, trade groups, labor unions
 - Fast food industry
 - Academia
 - Hospitals, physicians, nurses
 - SBA Office of Advocacy
 - Group of 60 Congressional Democrats
- **U.S. Chamber of Commerce: Pro-competitive benefits include promotion of R&D, workforce training**





Other Federal Agencies Weigh In

- ★ 4/19/2023 - DOJ Antitrust Division Comments Favorably on FTC's Proposed Non-Compete Rule
- ★ 5/30/2023 - NLRB GC Issues Memo to Regions to Treat Non-Competes as Potential Violations of NLRA

What the FTC's Proposed Rule Would Do

- “Non-compete” = “contractual term between an *employer* and a *worker* that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer”
- “Worker” includes *independent contractors*, interns, volunteers, etc.
- Also bans “*de facto*” non-competes, applying a “functional test” as to whether a term has the de facto effect of preventing the worker from being employed or operating a business regardless of what the term or provision may be called
- Requires employers to rescind existing non-competes within 180 days of “final rule” by providing individualized notice to current and former workers that their non-competes are no longer in effect
- Includes a narrow exception for non-competes in connection with the sale of a business, but only for “substantial owners” in the business
- Supersedes any state law contrary to the non-compete ban except for any state law providing greater worker protections



What the FTC's Proposed Rule Would Do

- **Does not ban: “Restrictive employment agreements” such as:**
 - Non-solicitation agreements re: customers or co-employees unless so broad they effectively become “*de facto*” non-competes
 - Confidentiality agreements (NDAs, trade secret protections) unless so broad they effectively become “*de facto*” non-competes
- **Fixed term agreements:** If an employee with a fixed term employment agreement leaves for a competitor before the contract term ends, the former employer could sue the departing employee for damages, but not bar the employee from taking the new job
- **Concurrent employment:** The non-compete ban “would apply only to post-employment restraints” not what the worker may do during the worker's current employment
 - Appears to permit “garden leave” clauses (where employee gives notice of leaving, but continues to be paid during notice period)





What the FTC's Proposed Rule Would Do

Sale-of-business non-competes expressly carved out for a person selling a business entity and disposing of all of the person's ownership interest, or selling all or substantially all of a business entity's operating assets

However, the person must own at least 25% of equity in the business when entering into the non-compete



What's likely to happen next?



- Before final rule is published, review by Office of Information and Regulatory Affairs within OMB
- FTC will address comments and issue final rule by end of 2023
- Final rule will take effect 60 days thereafter, followed by any specified compliance period

Likely Challenges

Lack of
statutory
authority

Major
questions
doctrine

Impermissible
delegation of
legislative
authority



What should employers do?

- **Consider moving away from non-competes by:**
 - Replacing with less restrictive, narrowly tailored NDAs, trade secret protections, non-solicitation agreements, etc.
 - Consider beefing up IP protections
 - Do not replace with less restrictive agreements that amount to "de facto" non-competes
- **If after consideration, you decide you must use some non-competes:**
 - Do not use them for hourly, or lower paid, or generally any unskilled workers (use instead less restrictive agreements)
 - Document your business's need for using any non-competes



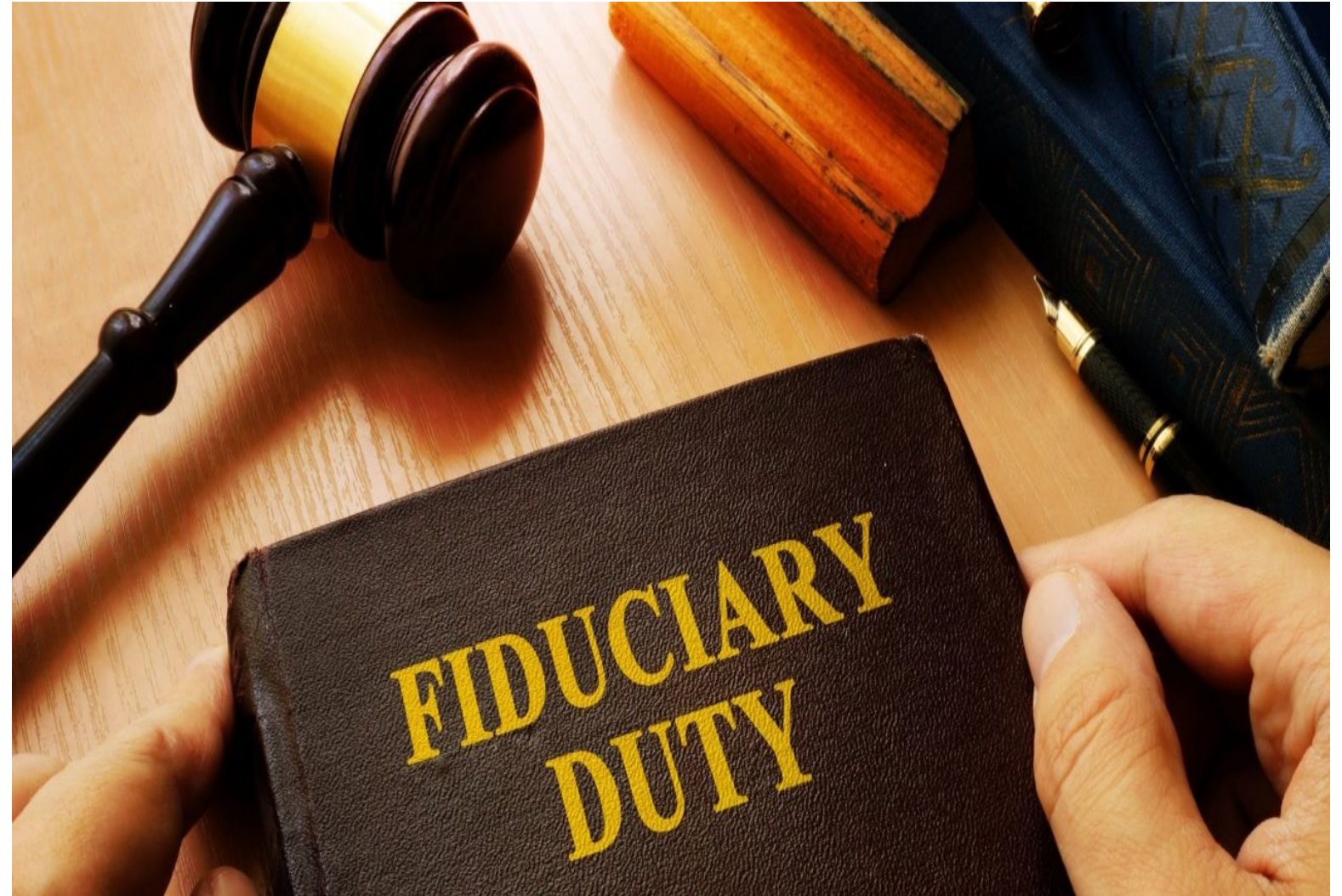
ERISA FIDUCIARY COMPLIANCE & LEGAL OBLIGATIONS

- **Transparency in Coverage (TiC) Rules**
- **No 'Gag' Attestations**
- **RxDC Reporting**
- **MHPAEA NQTL Analyses**
- **Compensation Disclosures & Vendor Oversight**
- **ERISA Litigation Trends**

ERISA HEALTH & WELFARE “FIDUCIARIES”

Health & Welfare Plan “Fiduciaries”

- Who are ERISA H&W Plan “fiduciaries”?
- What must they do?
- What your clients and **YOU** need to know about ERISA “fiduciary duties”?



WHO IS AN ERISA H&W PLAN “FIDUCIARY”?

- “Discretionary” authority to control or manage operation & administration of a benefit plan and its assets (function & not title driven)
- Employer/plan-sponsors – especially if self-funded plan (often TPA, ASO or consultant due to plan’s “fiduciary” designation)
- Insurers – if fully insured plan
- Plan vendors such as brokers/agents?

WHAT MUST AN ERISA H&W PLAN “FIDUCIARY” DO?

- Act **only** in the interests of plan participants & beneficiaries (*i.e.*, duty of loyalty w/∅ conflicts-of-interest)
- Perform plan duties **prudently** (*i.e.*, duty of care w/∅ negligence), which includes:
 - Following plan documents (unless inconsistent with ERISA)
 - Paying only **reasonable** plan expenses
 - Diversifying plan investments

ERISA'S H&W PLAN "NEW" LEGAL REQUIREMENTS

- Expanding “new” legal requirements –
 - 2021 CAA Division BB (Title I §§101-118 re: surprise medical billing & transparency)
 - Transparency in Coverage (TiC) Rules (price transparency)
 - No Surprises Act
 - No ‘Gag’ Attestations
 - RxDC Reporting
 - Compensation Disclosures & Vendor Oversight
 - MHPAEA NQTL Analyses

Transparency in Coverage (TiC) Rules

- Why TiC? (Price transparency to permit comparison shopping)
- TiC Rules – two basic requirements
 - Public Posting of in-network rates & out-of-network allowed amounts (in MRFs)
 - Internet self-service tool designed to provide:
 - Individualized OoP cost *estimates* for covered items or services including
 - Cost-sharing liability *prior* to receiving item or service
 - Like an EOB w/ actual rates & real-time deductibles/OoP maximums figured in
 - 2023 plan years - tool requirements apply to 500 items/services
 - 2024 plan years - tool requirements apply to *all* items/services/Rx's/DME's

TiC Rules (Cont'd)

- Employers with self-insured plans must ensure
 - That they &/or their TPAs/ASOs comply with TiC Rules
 - Failure to do so
 - Incurs \$100/day penalties
 - Likely breaches duties of ERISA plan fiduciaries
- Employers with fully insured plans should contract w/ their insurers to require insurers to comply w/ TiC Rules
 - Brokers/agents may need to advise employers re: this

“NO SURPRISES ACT” (NSA) (OVERVIEW ONLY)

- Many NSA provisions under legal challenge re: IDR process
 - Today, NSA overview only as NSA’s provisions too involved for more
 - But feel free to speak w/ me one-on-one re: NSA
- NSA protects from “surprise” billings
 - (1) From OoN providers of emergency care in In-Network facilities
 - Lawsuits re: OoN provider pay governed by a formula applied in IDR process
 - (2) From any provider (in non-emergencies) w/out 1st providing good faith cost estimate of items/services involved in the anticipated care
- NSA requires pricing “transparency” (to avoid “surprises”)
 - Rapid-fire regs/guidance due to overlapping laws and implementation

NO 'GAG' ATTESTATIONS

- Were due 12/31/2023 (timely complied?) & annually afterwards
- CAA 2021 outlawed “gag” clauses **restricting**
 - (1) Disclosure of provider-specific rates/costs & quality of care info
 - (2) E-access to de-identified claims & encounter info/data (consistent w/ HIPAA privacy regs)
 - (3) Sharing (1) or (2) or directing (1)/(2) be shared w/ a business associate (consistent w/ HIPAA privacy regs)
- But “reasonable” restrictions on *public* disclosure of some info/data not prohibited
 - Recall: TiC Rules *require* public disclosure of provider rates, etc.

NO 'GAG' ATTESTATIONS (Cont'd)

- No “Gag” attestations apply to fully insured & self-insured group health plans (GHP)
 - Employers/plans & Insurers must file
 - Fully insured plans may rely on insurers’ attestation
 - Self-insured plans may delegate to TPA/ASO/PBM or another to file attestations, but must **contract in writing** for such others to file
 - Failure to timely file – subject to \$100/day penalties
 - GHP = major medical, prescription drug & pharm benefit plans
 - Includes non-gov’tal plans, church plans, ACA g-fathered & g-mothered plans
 - Policies sold on or off of the ACA exchanges
 - Does not include STLDI, ACA-excepted benefits/policies, workers comp, etc.
 - For now, does not include retiree-only plans, HRAs, FSAs, Medicare/Medicaid plans, CHIP

NO 'GAG' ATTESTATIONS (Cont'd)

- No “Gag” Attestations are critical to “transparency”
- “Transparency” is a major federal gov’t target for enforcement
- Employers/plans encouraged to report violations to CMS &/or DOL re: non-compliant plans or policies imposing “gag” clauses
- Don’t be deceived: Prohibited “Gag” clauses are often cloaked with differing names, *e.g.* –
 - “Confidentiality” clause
 - “Proprietary” information clause
 - “Non-disclosure” agreement

PRESCRIPTION DRUG & DATA COLLECTION (RxDC) REPORTING

- CAA 2021 requires plans to collect Rx drug & total healthcare spending data and to report same to CMS
- For 2023, RxDC reporting is due by **6/1/2024**
- Insurers of individual health policies/GHPs ***must report***, including
 - ERISA fully insured/self-insured plans
 - State/local gov't plans, church plans & FEHB plans
 - ACA g-fathered/g-mothered plans
- But, *not including* HRAs (account-based plans), ACA-excepted benefits, STDLI, Medicare/Medicaid plans, retiree-only, or CHIP

RxDC REPORTING (Cont'd)

- What RxDC info must be reported? Generally, e.g., the following –
 - Spending on prescription Rx drugs and health care services
 - Prescription Rx drugs that account for the most spending
 - Drugs that are prescribed most frequently
 - Prescription drug rebates from drug manufacturers
 - Premiums and cost-sharing that patients pay
 - Rx drug rebates
- Purpose of RxDC reporting is to identify drivers of increases in Rx drug pricing & healthcare spending, to understand impact of Rx drug rebates on premiums/OoP costs & to promote “transparency”

RxDC REPORTING (Cont'd)

- Who must do RxDC reporting?
 - Self-insured plans *must* report but may, **by written contract**, delegate to TPAs, ASOs, PBMs, or other third-party vendors to function as their “reporting entities”
 - Fully insured plans rely on insurers to report (since insurers must report) but should *double-check* that their insurers do report
 - Brokers/agents: Confirm plan policies’ responsibility for reporting
- Different vendors may report differing plan components (e.g. Rx drugs & healthcare spending), but CMS discourages multi-vendor reporting of same-data sets

COMPENSATION DISCLOSURES & VENDOR OVERSIGHT

- CAA 2021 expanded ERISA's previous 401k retirement compensation disclosure requirements to include H&W plans
- ERISA H&W plan fiduciaries can be held liable for breach of fiduciary duty for not ensuring **prudent** spending
 - Part of **prudent** spending in a H&W plan includes knowing the compensation paid to insurers & their broker/agents/consultants
- Out of **prudence**, ERISA H&W plan fiduciaries must ask:
 - Broker/agent/consultants/vendors to fully disclose compensation
 - Not just premium quotes, but commissions & any other compensation
 - Whether comparable coverage options exist & each option's cost

COMP DISCLOSURES, VENDOR OVERSIGHT & LITIGATION TRENDS

- ERISA H&W plan fiduciary duties must *prudently* exercise oversight of plan vendors' business practices
 - This could lead to “prying” questions being asked – be prepared!
- Litigation is mounting against ERISA H&W plan fiduciaries for violations of duty of care (*i.e., imprudence*)
- **HERE'S** a brief history of ERISA retirement plan fiduciary litigation
 - A similar litigation trend could occur to ERISA H&W plan fiduciaries
 - So, H&W plan fiduciaries will have no choice but to oversee plan vendors

THE MHPAEA (OVERVIEW ONLY)

- What does the MHPAEA do?
 - Requires health policies/plans to provide “parity” between mental health (MH) & substance use disorder (SUD) benefits with all other covered medical/surgical (M/S) benefits
 - “Parity” includes quantitative & non-quantitative treatment limitations
 - Quantitative treatment limitations (QTLs) include financial & treatment limitations such as copays/coinsurance, visit limits, day limits, etc.
 - Nonquantitative treatment limitations (NQTLs) include preauthorization requirements, network sufficiency & medical management standards

THE MHPAEA (Cont'd)

- CAA 2021 & implementing rules create more formal “parity” analyses & impose reporting requirements, including
 - A formal (complicated) comparative analysis showing the processes, strategies, evidentiary standards and other factors used to apply NQTLs to MH/SUD benefits that are comparable to, and applied no more stringently than, those same factors applied to NQTLs to M/S benefits
- ERISA H&W plan fiduciaries must ensure these NQTL comparative analyses are conducted & reported
 - Failure to do so exposes plan fiduciaries to breach of fiduciary duty claims
- DOL’s proposed enforcement rules re: H&W plan’s NQTL analyses

LITIGATION TRENDS & IMPACT

- ERISA-governed H&W plan fiduciaries must now ensure their plans (or plan-purchased insurance policies) provide:
 - Transparency in coverage (TiC) – including price transparency
 - Do not permit “surprise” billings
 - Forbid “gag” clauses & annually attest they are not used
 - Annually report on RxDCs
 - Disclose vendors’ compensation & exercise vendor oversight
 - Comply with the MHPAEA’s QLT & NQLT comparative analyses & disclose same
- **FORECAST:** Litigation vs. retirement plan fiduciaries will bring similar litigation vs. H&W plan fiduciaries (impacting plan vendors)

Questions



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