

MODEL “HOLD-HARMLESS” LANGUAGE

For Agreements Between Employers Sponsoring Self-Funded Group Health Plans and Their Third Party Administrators

Introduction

As a public service, the Mental Health Treatment and Research Institute LLC (“MHTARI”), a not-for-profit subsidiary of the Bowman Family Foundation, has funded the development of Model Hold-Harmless Language for consideration by self-insured employers that have contracted with Third Party Administrators (“TPAs”). The concepts contained in this model language can be added to existing agreements¹ or included in new agreements between self-insured employers and their TPAs, as suggested by the National Alliance of Healthcare Purchaser Coalitions (“National Alliance”).

For example, the National Alliance publication “Purchaser Viewpoint: Health Policy in Transit, May 2018”, entitled “Mental Health Parity Revisited, Proposed FAQs Raise the Bar on Compliance”, states that: “Employers should not assume that their insurers or plan administrators are in compliance with parity...They may also want to contractually negotiate inclusion of a hold harmless clause for potential parity violations with the administrators of the plan.”

The Model Hold-Harmless Language addresses: (1) compliance with the Federal parity law (which is part of ERISA) as well as state parity laws, and (2) the allocation of risk in the event of noncompliance. While no document can eliminate all risk, the Model Hold-Harmless Language is intended to reduce risk for self-insured employers by requiring TPAs to hold such employers harmless for the financial risk of parity law noncompliance in several key areas.

DISCLAIMER – No Legal Advice: The Model Hold-Harmless Language is made available for informational purposes only and is not intended and should not be construed as providing legal advice. Each situation is highly fact specific and requires knowledge of both state and federal laws. Therefore, each employer should receive legal advice from a licensed attorney in the relevant jurisdictions when considering: (1) whether the Model Hold-Harmless Language would achieve its intended purpose and would be suitable for the self-insured employer’s agreement with a TPA; and (2) modifications to the Model Hold-Harmless Language that are needed to address the self-insured employer’s specific circumstances.

MHTARI disclaims any and all representations and warranties, express or implied, regarding the Model Hold-Harmless Language, including without limitation: (1) the effectiveness of the Model Hold-Harmless Language to achieve its intended purpose, or (2) the suitability or impact of the Model Hold-Harmless Language with respect to any self-insured employer’s health plan or any agreement between such employer and a TPA.

¹ Defined terms should be amended, as needed, to conform to the other sections of the agreement.

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Model Hold-Harmless Language Begins Here

Section []: Indemnification and Hold-Harmless with Respect to Parity Laws Governing the Employer's Health Plans that are the subject of this Agreement ("Plans")

Notwithstanding anything to the contrary in this Agreement or in any related agreements, appendices or exhibits:

(1)(a) TPA agrees and acknowledges that TPA is responsible, as a fiduciary under ERISA, for the administration of the Plans in compliance with the Mental Health Parity and Addiction Equity Act, as amended by the Consolidated Appropriations Act, 2020 and any future amendments ("MHPAEA") and any applicable state laws governing parity between mental health and substance use disorder ("MH/SUD") benefits and medical and surgical ("M/S") benefits (collectively, "Parity Laws"), and that such responsibilities include, without limitation, the following:

- (i) development and application of the non-quantitative treatment limitations of the Plans ("NQTLs");
- (ii) preparation and documentation of a comparative analysis of the Plans' design and application of NQTLs, as required under the Parity Laws;
- (iii) the determination of benefit coverage under the Plans, both administratively and through medical management (for example, determinations made with respect to utilization reviews, claims and appeals); and
- (iv) fulfillment of disclosure requirements with respect to Plan participants, beneficiaries, claimants (or their authorized representatives), and federal and state regulatory and enforcement agencies, as applicable.

(1)(b) TPA agrees to indemnify and hold harmless the Employer, its affiliates and each of their respective officers, directors, and employees ("Indemnities") with respect to any and all losses, liability, damages, expenses, settlements, costs or obligations, including reasonable attorneys' fees (collectively, "Losses") that the Indemnities may incur as a direct or indirect result of the (i) negligence, willful misconduct, or intentionally tortious, dishonest, or criminal acts of the TPA, its affiliates, or its agents in the performance of the TPA's obligations under Section(s) [] (1)(a), and (ii) any breach of Section(s) [] (1)(a) by TPA, its affiliates, or its agents, including, without limitation, breach of ERISA fiduciary responsibilities or the ERISA standard of care.

(1)(c) Section(s) [] (1)(b) shall survive termination of this Agreement.

End of Model Hold-Harmless Language