

September 28, 2022

The Honorable Nancy Pelosi
United States House of Representatives
Washington, DC 20515

The Honorable Kevin McCarthy
United States House of Representatives
Washington, DC 20515

Dear Speaker Pelosi and Leader McCarthy,

The HR Policy Association and the American Health Policy Institute write to express our serious concerns with regarding certain provisions included in H.R. 7780, the Mental Health Matters Act of 2022. Specifically, provisions from H.R. 7767, the Strengthening Behavioral Health Benefits Act and H.R. 7740, the Employee and Retiree Access to Justice Act. We urge you to drop these unnecessary and disruptive provisions from the legislation, or vote no on H.R. 7780.

The HR Policy Association is the leading organization representing the chief human resource officers of over 400 of the largest employers in the United States. Collectively, their companies provide health care coverage to over 21 million employees and dependents in the United States. The American Health Policy Institute, which was created by the Association, serves to examine the challenges employers face in providing health care to their employees and recommends policy solutions to promote the provision of affordable, high-quality, employer-based health care. Our member companies are deeply committed to providing affordable, timely and high-quality mental health and substance use disorder benefits, and work hard to ensure the benefits they provide are fully compliant with ERISA and the Mental Health Parity and Addiction Equity Act (MHPAEA).

More Guidance Will Achieve Mental Health Parity, Not Civil Monetary Penalties

HR Policy strongly opposes enacting civil monetary penalties for mental health parity violations before the Department of Labor (DOL) publishes and implements its parity rulemaking and the additional guidance that is required by the Consolidated Appropriations Act of 2021 (CAA).

Congress recognized that employers needed substantially more guidance to implement the complicated mental health parity requirements for nonquantitative treatment limitations (NQTLs) when it enacted the CAA. Specifically, Congress required DOL to publish a “compliance program guidance document” that provides “illustrative, de-identified examples” of previous findings of compliance and noncompliance, including:

- Examples illustrating requirements for information disclosures and nonquantitative treatment limitations; and
- Descriptions of the violations uncovered during the course of such investigations.¹

¹ 29 U.S.C. 1185a(a)(6)(B)(i).

Importantly, the CAA requires the examples to “provide sufficient detail to fully explain such finding, including a full description of the criteria involved for approving medical and surgical benefits and the criteria involved for approving mental health and substance use disorder benefits.”²

Under the CAA, DOL was supposed to publish this guidance 18 months after the CAA was enacted (July 2022) and is required to provide at least a 60-day public comment period before issuing any final guidance. To date, this critical guidance has not been proposed by DOL, much less finalized. It is inappropriate to expand DOL’s enforcement authority given the Department’s interpretation of MHPAEA and its implementing regulations remains unclear.

Moreover, imposing civil monetary penalties on plan sponsors will not solve the serious problem of provider shortages. According to HHS, 129.6 million Americans live in areas designated as Mental Health Professional Shortage Areas,³ and 6,559 additional behavioral health providers⁴ are needed to fill these provider gaps.⁵ Addressing this long-term problem will require significant investments by the federal government.

Employers have innovated and invested in significant new behavioral health benefits during the COVID pandemic. Addressing the current mental health care crisis and achieving mental health parity compliance will require significant efforts in partnership between employers, providers, government, patient groups and other stakeholders. We believe that enacting punitive legislative provisions like civil monetary penalties at this point will poison these efforts and serve only to hurt patients.

Prohibiting Arbitration Will Delay Timely Resolution of Benefit Disputes

The evidence supporting arbitration is overwhelming. According to former U.S. Supreme Court Justice Stephen Breyer: [Arbitration] is usually cheaper and faster than litigation; it can have similar procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearing and discovery devices.⁶ Moreover, even the harshest critics of arbitration appear to accept certain of its various virtues, including the ability of arbitration procedures to flexibly address individualized grievances and complaints, its ability to resolve disputes expeditiously, its cost-effective structure as compared to court litigation, and the equitable results that it provides to stakeholders. These attributes have been

² 29 U.S.C. 1185a(a)(6)(B)(ii).

³ Bureau of Health Workforce Health Resources and Services Administration, U.S. Department of Health & Human Services, “Designated Health Professional Shortage Areas Statistics,” September 30, 2021, available at: <https://data.hrsa.gov/Default/GenerateHPSAQuarterlyReport>.

⁴ Behavioral health providers are health care practitioners or social and human services providers who offer services for the purpose of treating mental disorders including: psychiatrists, clinical social workers, psychologists, counselors, credentialed substance use specialists, peer support providers, and psychiatric nurse providers.

⁵ Bureau of Health Workforce Health Resources and Services Administration, U.S. Department of Health & Human Services, “Designated Health Professional Shortage Areas Statistics,” September 30, 2021

⁶ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

recognized from a wide spectrum of sources including quotes from Supreme Court justices and excerpts from research studies and various scholarly sources.

H.R. 7740 would upend the administration of health benefits for millions of employees by prohibiting arbitration that allows employers, who rely on expert vendors and other professionals to assist with complexities of health plan administration, to quickly and fairly resolve benefit disputes. Further, H.R. 7740 subverts well-established patient appeals procedures from the Patients' Bill of Rights Act of 1999 and the Affordable Care Act of 2010 in favor of private litigation.

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For these reasons we urge you to drop these premature and disruptive provisions from the legislation, or vote no on H.R. 7780.

Sincerely,

A handwritten signature in blue ink that reads "D. Mark Wilson". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

D. Mark Wilson
President and CEO, American Health Policy Institute
Vice President, Health & Employment Policy
HR Policy Association

A handwritten signature in black ink that reads "Margaret Faso". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Margaret Faso
Director, Health Care Research and Policy
HR Policy Association, American Health Policy Institute