



New Proposed Mental Health Parity Rules and the Challenges They Would Create

September 20, 2023 / Elena Lynett / Eric Miller

Agenda

Background on Mental Health Parity

Recently Issued MHPAEA Materials

A Closer Look at the Proposed MHPAEA Regulations

Plan Sponsor Considerations

Background on Mental Health Parity

Timeline of the Mental Health Parity and Addiction Equity Act (MHPAEA)

Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)

2008

2010

Interim Final Regulations

Final Regulations

2013

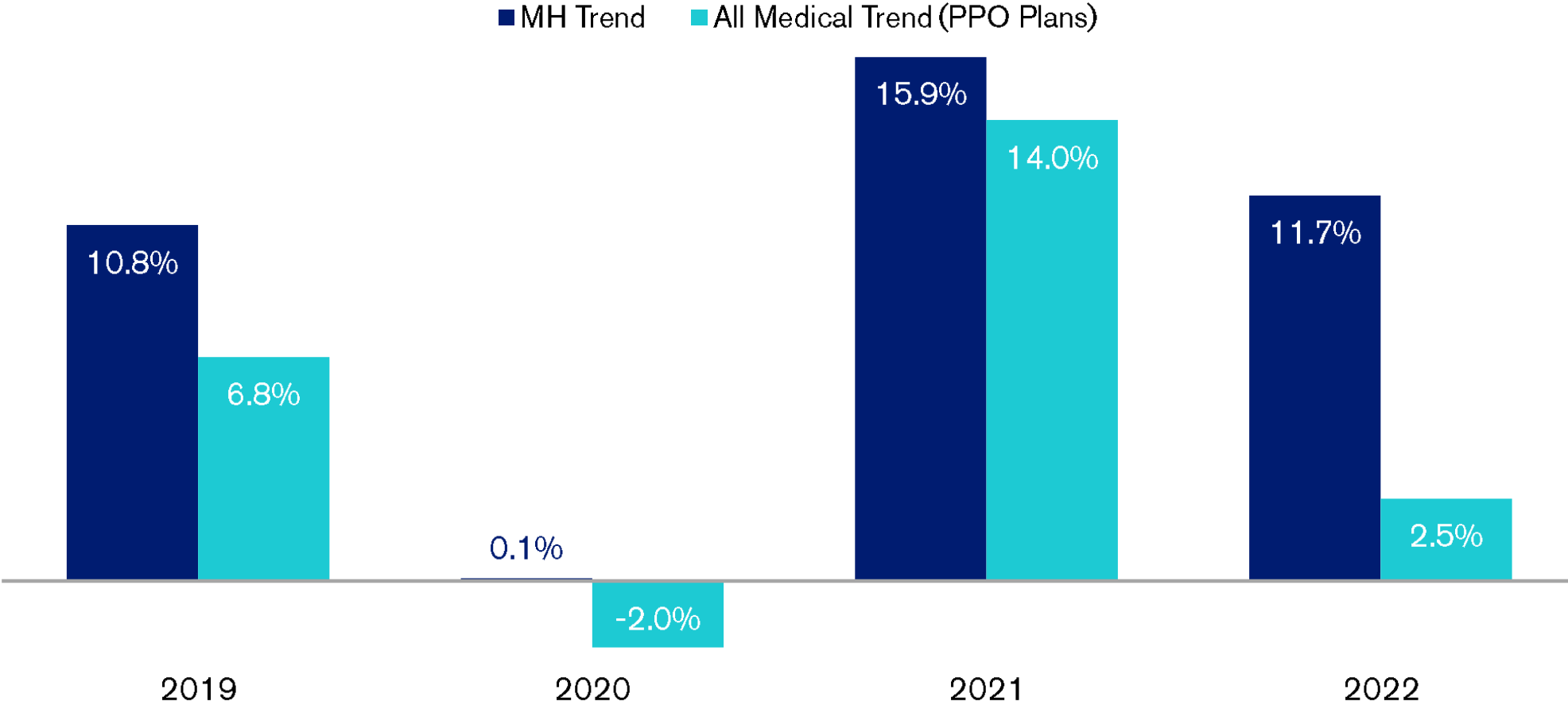
Statutory Amendments to MHPAEA through the Consolidated Appropriations Act of 2021

2020

Proposed MHPAEA Regulations

2023

Mental Health Trend Is Increasing Faster than General Medical Trend



Source: Segal's SHAPE data warehouse, 2019–2022

MHPAEA—Overview of 2013 Final Regulations

- MHPAEA requires parity between medical/surgical (med/surg) benefits and mental health (MH) and substance use disorder (SUD) benefits
- 2013 final regulations set out parity standards in the following areas:
 - Quantitative parity analysis (financial requirements & treatment limits)
 - Parity with respect to non-quantitative treatment limits (e.g., medical management)
 - Certain designs specifically prohibited (e.g., separate deductibles or out-of-pocket limits)
- No requirement to provide MH or SUD coverage (but IF covered, must cover in every classifications where med/surg services are provided)

Examples of NQTLs in 2013 Final Regulation

- Prior authorization or ongoing authorization requirements
- Concurrent review standards
- Formulary design for prescription drugs
- Standards for provider admission to participate in a network, including reimbursement rates
- Refusal to pay for higher-cost therapies until it can be shown that a lower-cost therapy is not effective (also known as “fail-first” policies or “step therapy” protocols)
- Exclusions of specific treatments for certain conditions

2013 Regulations General Rule for Parity in NQTLs

GHPs (and health insurance issuers) prohibited from:

Imposing **a nonquantitative treatment limit** on mental health/substance use disorder benefits **unless** processes, strategies, evidentiary standards or other factors used to apply it to MH/SUD are **comparable and not more stringently applied** than standards used for med/surg

Compare within each classification.

Strengthening Parity Mental Health/Substance Use Disorder

- Enacted December 27, 2020
- Requires group health plans to perform and document comparative analyses of the design and application of nonquantitative treatment limitations (NQTLs)
- Plans were required to be prepared to make these comparative analyses available to the Departments of Labor and/or Health and Human Services upon request beginning 45 days after the date of enactment (February 10, 2021)



Strengthening Parity in MH/SUD

Plans generally have been working with benefit administrators to collect documented NQTL comparative analyses regarding administrative activities

DOL, HHS, and Treasury issued initial guidance regarding the new requirements on April 2, 2021 under FAQ Set 45

About This Tool

The goal of this self-compliance tool is to help group health plan administrators, group and individual market health plan administrators, group and individual market health plans determine whether a group health plan or health plan complies with the requirements of the Mental Health Parity and Addiction Equity Act (MHPAEA) under the Employee Retirement Income Security Act (ERISA), the Department of Labor (DOL), the Department of Health and Human Services (HHS), and the Treasury (collectively, the "Agencies"). The requirements described in this tool generally apply to group health plans and health insurance issuers, and individual market health plans that do not apply as broadly are so noted.

This tool does not provide legal advice. Rather, it provides information to help group health plan administrators, group and individual market health plan administrators, group and individual market health plans determine whether a group health plan or health plan complies with the requirements of MHPAEA, or related guidance issued by the Department of Labor (DOL), the Department of Health and Human Services (HHS), and the Treasury (collectively, the "Agencies"). For more information, see <https://www.dol.gov/agencies/ebsa/laws-and-regulations/2014/08/01/faq-45>.

Furthermore, as directed by Section 13001(a) of the Consolidated Appropriations Act of 2021, the available tool is a compliance program guidance document. DOL will update the self-compliance tool on MHPAEA's requirements, as appropriate.

MHPAEA, as a federal law, sets minimum standards for group health plans and health insurance issuers with respect to parity requirements. However, many states have enacted laws that provide additional parity between mental health and substance use disorder benefits and medical/surgical benefits by supplementing the requirements of MHPAEA. Issuers should consult with their state regulators to understand the full scope of applicable requirements.

This tool provides a number of examples that demonstrate how a plan or issuer might or might not comply with the requirements of MHPAEA. The examples included in the Appendix I. The fact pattern for each example is provided to help group health plans and health insurance issuers identify potential compliance issues.

Examples of MHPAEA enforcement actions that the DOL has taken are included in the MHPAEA Enforcement Fact Sheets, available at <https://www.dhs.gov/ebsa/laws-and-regulations/laws/mental-health-and-substance-use-disorder/2014/08/01/faq-45>. Examples of MHPAEA enforcement actions that HHS has taken are included in the "Other Resources" MHPAEA Reports at <https://www.cms.gov/Other-Resources#mental-health-parity>.

Self-Compliance Tool for the Mental Health Parity and Addiction Equity Act (MHPAEA)

About This Tool2
Introduction3
Definitions4
SECTION A. APPLICABILITY6
SECTION B. COVERAGE IN ALL CLASSIFICATIONS8
SECTION C. LIFETIME AND ANNUAL LIMITS13
SECTION D. FINANCIAL REQUIREMENTS AND QUANTITATIVE TREATMENT LIMITATIONS14
SECTION E. CUMULATIVE FINANCIAL REQUIREMENTS AND TREATMENT LIMITATIONS18
SECTION F. NONQUANTITATIVE TREATMENT LIMITATIONS19
SECTION G. DISCLOSURE REQUIREMENTS29
SECTION H. ESTABLISHING AN INTERNAL MHPAEA COMPLIANCE PLAN33
APPENDIX I: ADDITIONAL ILLUSTRATIONS35
APPENDIX II: PROVIDER REIMBURSEMENT RATE WARNING SIGNS38

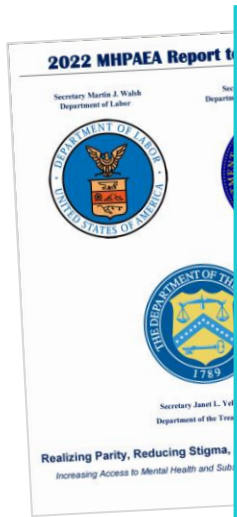
1 | Page

Enforcement Priorities

- The 2021 FAQs do not provide an exhaustive list of NQTLs regarding which the Departments may request the comparative analysis and reinforce the need to perform and document comparative analyses for all NQTLs imposed
- The DOL indicates that it expects to focus its enforcement efforts on:
 - Prior authorization requirements
 - Concurrent review requirements
 - Standards for provider admission to participate in a network (including reimbursement rates)
 - Out-of-network reimbursement rates



Federal Enforcement Has Continued to Increase



Realizing Parity,
Reducing Stigma,
and Raising
Awareness
[2022 MHPAEA Report to Congress \(dol.gov\)](https://www.dol.gov/ebsa/2022-mhpaea-report-to-congress)



DOL 2020 Report to Congress
[Parity Partnerships: Working Together \(dol.gov\)](https://www.dol.gov/ebsa/2020-report-to-congress-parity-partnerships-working-together)



DOL published an updated 2020 MHPAEA Self-Compliance Tool
<https://www.dol.gov/agencies/ebsa/at-a-glance>

Reports to Congress bi-annually since 2012

Annual FY Enforcement Fact Sheets 2015 to 2022 available on the DOL website

Recently Issued MHPAEA Materials

New Mental Health Guidance Released

On July 25, 2023, the Departments issued a package of guidance:

- Proposed rules, later formally published in the FR on August 3
- Technical release seeking information and comments with respect to guidance for proposed data collection and evaluation requirements for nonquantitative treatment limitations related to network composition
- The 2023 MHPAEA Comparative Analysis Report to Congress
- Enforcement Fact Sheet regarding fiscal year 2022 enforcement results
- Press Release announcing guidance

DOL press release frames the guidance

“...an important step in addressing the nation’s mental health crisis by proposing rules to better ensure that people seeking coverage for mental health and substance use disorder can access treatment as easily as people seeking coverage for medical treatment.”

Mental Health Parity proposed regulations

The August 3, 2023, proposed rules revise the 2013 final rules as well as including new, additional requirements related to documented NQTL comparative analyses

Proposed applicability for plan years beginning on and after January 1, 2025



A Closer Look at the Proposed MHPAEA Regulations

MHPAEA Proposed Rules

Introductory Overview

- Includes changes to the 2013 MHPAEA final regulations as well as new, additional requirements, including required data collection
- Includes new provisions for the content requirements of the NQTL comparative analyses required under MHPAEA
- Provides transition period to comply with new requirements. Proposes plan years on or after January 1, 2025 applicability date
- Includes HHS-only amendments to implement the sunset provision for self-funded, non-Federal governmental plan elections to opt out of compliance with MHPAEA

Revised, Expanded List of NQTLs

- Medical management standards (such as prior authorization and concurrent review) limiting or excluding benefits based on medical necessity or medical appropriateness, or based on whether the treatment is experimental or investigative
- Formulary design for prescription drugs
- For plans with multiple network tiers (such as preferred providers and participating providers), network tier design
- Plan methods for determining out-of-network rates, such as allowed amounts; usual, customary, and reasonable charges; or application of other external benchmarks for out-of-network rates
- Refusal to pay for higher-cost therapies until it can be shown that a lower-cost therapy is not effective (also known as fail-first policies or step therapy protocols)
- Exclusions based on failure to complete a course of treatment
- Restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits for services provided under the plan.

Network Composition NQTLs

Network composition NQTLs include but are not limited to:

- Standards for provider and facility admission to participate in a network or for continued network participation
- Methods for determining reimbursement rates
- Credentialing standards
- Procedures for ensuring the network includes an adequate number of each category of provider and facility to provide covered services under the plan or coverage

NQTLs Listed in the Preamble

- Billing restrictions (e.g., licensed provider must bill through or under the supervision of another type of licensed provider)
- Retrospective review
- Treatment plan requirements
- Refusal to cover treatment until comprehensive assessment by specific providers
- Outlier management
- Limitations based on expectation of improvement, likelihood of progress, or demonstration of progress

Plans must document compliance for any NQTL even if not listed in the regulations.

Key Proposed Requirements

- Application of predominant/substantially all testing to NQTLs
- Data collection requirements
- Meaningful benefit requirement
- Prohibition on separate NQTLs targeted at MH/SUD
- New and expanded examples
- Documented comparative analysis content, timing, findings of noncompliance
- Opt-out for non-federal governmental plans sunset

New 3 Part Test for the Application of NQTLs



Substantially All/Predominant Test-A plan may not apply any NQTL to MH/SUD benefits in any classification that is more restrictive, as written or in operation, than the **predominant** NQTL that applies to **substantially all** M/S benefits in the same classification.



Design and Application/ Nondiscrimination Test a plan **must satisfy requirements related to parity in the “design and application” of NQTLs (which is ultimately now documented) and ensure that no factor or evidentiary standard “discriminates” against MH/SUD benefits as opposed to M/S benefits.**



Outcomes Data

Exception for use of independent professional medical or clinical standards, or standards related to fraud, waste, and abuse.

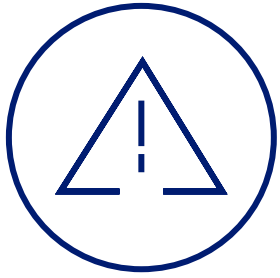
Predominant/Substantially All Test

Substantially All: An NQTL would be considered to apply to substantially all Med/Surg benefits in a classification if it applies to at least 2/3 of all Med/Surg benefits in that classification

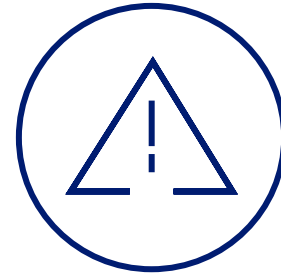
Predominant: Under the QTL rules an NQTL would be considered predominant if it applies to more than 1/2 of the portion of plan payments for Med/Surg benefits subject to the NQTL in a classification, however the Departments acknowledge this may not translate well to NQTLs and propose that for NQTLs the predominant would be the most common level of the NQTL

Plan specific data is expected to be used unless an actuarial finding supports that there is not sufficient data to make the relevant projections

Exceptions



For independent professional medical or clinical standards



For standards related to fraud, waste, and abuse

Expanded Data Collection Requirements

For all NQTLs

- Relevant data includes the number and percentage of relevant claims denials and any other data relevant to the NQTL required by state law or private accreditation standards
- Would be required to provide data on access to MH/SUD benefits as compared to M/S benefits

Network Composition NQTLs Data

For network composition NQTLs, plans would also be required to collect and evaluate network composition-related data including:

- out-of-network utilization
- percentage of in-network providers actively submitting claims
- time and distance standards
- reimbursement rates

Departments separately issued Technical Release seeking information and comments related to network composition standards

Material Differences in Data

- In instances where material differences are detected (except for the standards related to network composition), a plan would be expected to take reasonable action to address the material differences in access as necessary to ensure compliance in operation, and document those actions. Material differences in data will be considered a strong indicator that the plan violates MHPAEA
- With respect to evaluating differences in network composition data, the Departments are proposing that with regard to material differences in access to MH/SUD benefits as compared to M/S benefits, a plan fails to meet the requirements of MHPAEA
- However, the proposed rule does not define what constitutes “material”

Proposed Enforcement Safe Harbor

- The Departments intend to create an enforcement safe harbor only with respect to NQTLs related to network composition for plans and issuers that meet or exceed specific data-based standards identified in future guidance
- Generally, plans and issuers that satisfy the terms of the safe harbor would not be subject to an enforcement action by the Departments under MHPAEA with respect to NQTLs related to network composition for a period of two calendar years from the date the comparative analysis was requested

Content Requirements for NQTL Comparative Analyses Reports



A description of the NQTL

Identification and definition of the factors used to design or apply the NQTL

Description of how factors are used in the design and application of the NQTL

Demonstration of comparability and stringency as written

Demonstration of comparability and stringency in operation

Findings and conclusions

There are additional, extensively detailed requirements regarding the specifics for the contents required under each step

Additional Content Requirements

- Would require comparative analysis to include the date of the analysis
- Would have to include the title and credentials of all relevant persons who participated in the performance and documentation of the comparative analysis
- If the comparative analysis relies upon an evaluation by an individual considered to be an expert:
 - must include an assessment of each expert's qualifications, and
 - indicate the extent to which the plan or issuer ultimately relied upon each expert's evaluation in performing and documenting the comparative analysis of the design and application of each NQTL applicable to both MH/SUD benefits and M/S benefits

Additional Content Requirements

Certification by Named Fiduciary: For plans subject to ERISA, the comparative analysis would be required to include a certification by one or more named fiduciaries who have reviewed the analysis, stating whether they found the comparative analysis to be compliant with the content requirements of the proposed rules

List of NQTLs: Each plan or issuer must prepare and make available to the Secretary and any named fiduciaries, upon request, a written list of all NQTLs imposed under the plan or coverage and a general description of any information considered or relied upon by the plan or issuer in preparing the comparative analysis for each NQTL

Requests and Findings of Noncompliance

10 business days to respond to an initial request

10 business days when an initial response is found insufficient and DOL or HHS requests supplemental information

7 days to notify participants and beneficiaries when a final determination of noncompliance is issued.

Significant enforcement is anticipated once rules are finalized.

Additional Changes Under the Proposed Regulations

Meaningful benefits: MH/SUD benefits must be meaningful benefits for treatment of the condition or disorder in a classification, determined in comparison to the benefits provided for M/S conditions in such classification

Protocols for information gathering: Plans and issuers should have clear protocols and processes in place to ensure that the service providers and TPAs for both Med/Surg and MH/SUD benefits provide sufficient information regarding plan structure and benefits to each other and the plans and issuers that they serve to ensure that the MH/SUD benefits are coordinated with the M/S benefits for purposes of compliance with MHPAEA.

Examples: In addition to the rules, the proposed regulations contain new expanded examples of compliance

Sunset of the Opt-out for Non-Federal Governmental Plans

- Prior to December 30, 2022, self-funded, non-federal governmental plans had the option to opt-out of MHPAEA
- The 2023 CAA eliminated the availability of the opt-out to non-Federal governmental plans
- The MHPAEA opt-out sunsets as follows:
 - No opt-out elections allowed after December 29, 2022
 - Any opt-out election that expires on or after June 27, 2023, cannot be renewed
 - A plan that is subject to multiple collective bargaining agreements of varying lengths with an opt-out expiring on or after July 27, 2023, may extend the election until the last collective bargaining agreement expires

Comment Deadline



The Departments are soliciting comments on all aspects of the proposed rules



In addition, the Departments issued a Technical Release requesting information and comments related to network composition



Comments must be submitted no later than October 2, 2023

**Extension Granted:
Comments due October 17, 2023**

Efforts Underway

Many stakeholders requested an extension of the comment period given the complexity of the proposed requirements.

Segal web post available!

Next upcoming client webinar:

A closer look at DOL MHPAEA Enforcement and the 2023 Report to Congress



2023 MHPAEA Comparative Analysis Report to Congress

- Includes information on the Departments' enforcement efforts related to MHPAEA
- Details the Departments' review of NQTL comparative analyses that plans and issuers submitted to the Departments
- Identifies plans and issuers that received final determinations of noncompliance with MHPAEA

Plan Sponsor Considerations

What Can Plan Sponsors Do Now?

Comment. Read the proposed regulations and consider submitting comments.

Continue compliance efforts and for plans whose sunset is expiring don't forget to focus on **All** MHPAEA requirements

Contact vendors to ascertain their capabilities to support compliance efforts, including their ability to provide the proposed data and claims reporting

Consider revising agreements, such as adding details to administrative service agreements related to expected obligations under MHPAEA

Resolve complaints. As always, plans should work diligently to investigate and resolve any parity compliance complaint



Elena Lynett

*Senior Vice President and
National Health Compliance*
elynett@segalco.com



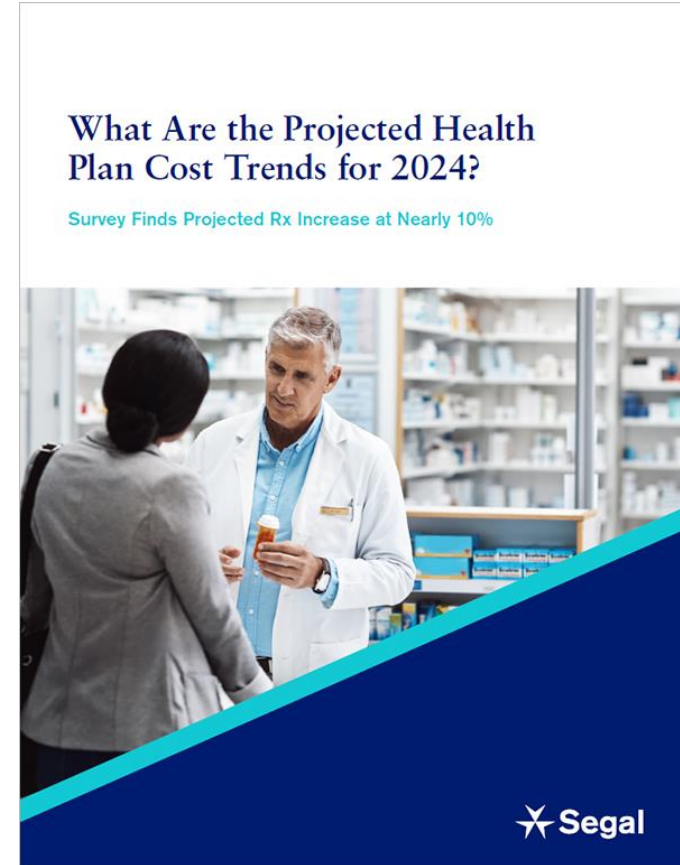
Eric Miller

*Vice President and
Consulting Actuary*
emiller@segalco.com



Webinar on the 2024 Segal Health Plan Cost Trends Survey

Thursday, October 5
1 pm–2 pm ET



Visit [Segalco.com](https://www.segalco.com) for more details and to register.

Thank You!