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## Employee Assistance Professionals Association

*Sponsor of the CEAP Certification Program*

**To:** Office of Health Plan Standards and Compliance Assistance, Employee Benefits Security Administration, Room N-5653, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210

### **Attention: Excepted Benefits**

**Date:** February 24, 2014

On behalf of the Employee Assistance Professionals Association (EAPA) and its members, we welcome this opportunity to submit comments on the proposed rules regarding employee assistance programs (EAPs) as excepted benefits. EAPA is a 501(c)(3) non-profit membership organization whose mission is to promote the highest standards of employee assistance (EA) practice and the continuing development of EA professionals, programs, and services.

As the oldest and largest professional association in the employee assistance field, EAPA is the leading provider of information, education, and support for EA professionals. EAPA publishes the *Journal of Employee Assistance*, hosts professional conferences, sponsors the only professional certification credential (CEAP®) for EA professionals, and offers training and other resources to fulfill its mission. EAPA's 4400 members and certified EA professionals together serve tens of thousands of organizations employing tens of millions of employees.

### **Context of comments**

EAPA's comments on the proposed regulations are made in the context of the following definition and essential core components of EAPs, as published in the *Standards and Professional Guidelines for Employee Assistance Programs* and posted online at <http://www.eapassn.org/files/public/EAPASTANDARDS10.pdf>.

Employee Assistance Programs (EAPs) serve organizations and their employees in multiple ways, ranging from consultation at the strategic level about issues with organization-wide implications to individual assistance to employees and family members experiencing personal difficulties.... In general, an EAP is a set of professional services specifically designed

- to improve and/or maintain the productivity and healthy functioning of the workplace and to address a work organization's particular business needs
- through the application of specialized knowledge and expertise about human behavior and mental health.

More specifically, an EAP is a workplace program designed to assist: (1) work organizations in addressing productivity issues, and (2) "employee clients" in identifying and resolving personal concerns, including health, marital, family, financial, alcohol, drug, legal, emotional, stress, or other personal issues that may affect job performance.

The essential components of an EAP have historically been known as the "EAP core technology." These components combine to create a unique approach to addressing work-organization productivity issues and "employee client" personal concerns affecting job performance. EAP core technology is:

- (1) Consultation with, training of, and assistance to work organization leadership (managers, supervisors, and union officials) seeking to manage troubled employees, enhance the work environment, and improve employee job performance;
- (2) Active promotion of the availability of EA services to employees, their family members, and the work organization.
- (3) Confidential and timely problem identification/assessment services for employee clients with personal concerns that may affect job performance;
- (4) Use of constructive confrontation, motivation, and short-term intervention with employee clients to address problems that affect job performance;
- (5) Referral of employee clients for diagnosis, treatment, and assistance, as well as case monitoring and follow-up services;
- (6) Assisting work organizations in establishing and maintaining effective relations with treatment and other service providers, and in managing provider contracts;
- (7) Consultation to work organizations to encourage availability of and employee access to health benefits covering medical and behavioral problems including, but not limited to, alcoholism, drug abuse, and mental and emotional disorders; and
- (8) Evaluation of the effects of EA services on work organizations and individual job performance.

### **Comments on the proposed regulations**

The proposed regulations set forth four criteria for EAP services to qualify as excepted benefits beginning in 2015.

**Criterion 1: The program cannot provide significant benefits in the nature of medical care.** *The Departments invite comments on how to define "significant." For example, the Departments request comments as to whether a program that provides no more than 10 outpatient visits for mental health or substance use disorder counseling, an annual wellness checkup, immunizations, and diabetes counseling, with no inpatient care benefits, should be considered to provide significant benefits in the nature of medical care.*

EAPA agrees with and endorses this first criterion. However, EAPA encourages the Departments to look to indicators other than a particular number of outpatient visits or sessions as a determinant of "significant" medical care. Today's EAPs deliver services in multiple modalities, including face-to-face visits, telephone, video, text, online chat, and others. The number, duration and intensity of each contact varies depending on the purpose, content, and context, as well as the modality. Moreover, many of these contacts address issues, such as legal, financial, dependent care, and other concerns, that clearly are not medical care. Although many EAP contracts are still written to include a certain number of "sessions," such language is increasingly anachronistic in today's EAP world.

While EAPA doesn't presume to have the expertise to define the boundaries of significant medical care, it is universally accepted and agreed in the EA field that EAPs do not provide inpatient, residential, partial

residential, or intensive outpatient care. Nor do they rely in any way on the concept of “medical necessity” in determining an employee’s eligibility for service. Instead, their fundamental goal is to improve and/or maintain the productivity and healthy functioning of the workplace by helping employees identify and address any personal concern that may interfere with their job performance. Further detail about the generally accepted scope of EAPs can be found in the “EAP core technology” components listed above and the “Other criteria for consideration” section below.

**Criterion 2: EAP benefits cannot be coordinated with benefits under another group health plan.**

*The Departments propose three conditions to meet this standard.*

- A. *Participants in the separate group health plan must not be required to exhaust benefits under the EAP (making the EAP a “gatekeeper”) before an individual is eligible for benefits under the other group health plan.*
- B. *Participant eligibility for benefits under the EAP must not be dependent on participation in another group health plan.*
- C. *Benefits under the EAP must not be financed by another group health plan.*

EAPA agrees with and endorses this second criterion. Comments regarding each of the proposed conditions follow.

Condition A. EAPA agrees with and endorses this condition. The goals, requirements, and structure of health plans and EAPs are very different. To require the EAP to act as gatekeeper to using health plan services would distort and undermine the EAP and would create significant problems for the organization with respect to the Mental Health Parity and Addiction Equity Act (MHPAEA).

Condition B. EAPA agrees with and endorses this condition. An essential component of every EAP is its availability for organizational representatives (e.g. managers, supervisors, human resources) to refer an employee to the EAP when the employee’s job performance or ability to function effectively at work appears to be declining or may be in jeopardy. Often, EAPs work with entire departments or teams of employees. If employee (or supervisor) eligibility to use EAP services were dependent on participation in another group health plan, this basic component of EAPs would become untenable and would prevent the EAP from achieving the goals for which the employer established it.

Condition C. The meaning of this condition is ambiguous. For example,

- If Condition C is intended to prohibit certain “benefits” provided by the EAP from being subsidized by a group health plan, while other benefits provided by the EAP are not, EAPA could support the condition because such subsidization would likely distort referral decisions within the EAP, potentially making them based more on the subsidies than on client best interests. EAPA has not observed this type of arrangement in the marketplace.
- If Condition C is intended to prohibit the overall cost of the EAP from being “subsidized by” or embedded entirely in a health plan, EAPA could support the condition because experience has shown that such subsidization or embedding may lead to essential components of the EAP, such as program promotional activities and organizational and supervisor consulting, being minimized at the expense of the overall effectiveness of the EAP.
- If Condition C is intended to prohibit providers (owners) of group health plans from also providing EAP services under a separate contractual arrangement, EAPA would be opposed to the condition because many providers currently do offer both kinds of plan, and these ownership arrangements typically have no impact on whether the EAP, itself, should be considered a health plan.

Because of the ambiguity, EAPA cannot endorse this condition as currently written and recommends that it be eliminated or clarified with further input to be solicited.

**Criterion 3. No employee premiums or contributions are required to participate in the EAP.**

EAPA agrees with and endorses this third criterion. EAPs historically and almost universally have been paid entirely by the employer. Employee premiums or contribution are inconsistent with the intent and effective operation of EAPs.

**Criterion 4. There is no cost sharing under the EAP.**

EAPA agrees with and endorses this fourth criterion. As with the third criterion above, cost sharing arrangements for use of EAP services are inconsistent with the intent and effective operation of EAPs.

**Other Criteria for Consideration**

*The Departments request comments on whether the criteria proposed are sufficient to prevent the potential for abuse, including the evasion of compliance with the mental health parity provisions, and whether different or additional standards should be included.*

To further clarify the distinction between EAPs and health plans covered by the PPACA, EAPA suggests that the Departments consider adding a fifth criterion for EAPs to qualify as excepted benefits, namely that they include all eight essential EAP components, as described above at the top of page two of this document. Requiring these eight essential components would further reinforce the nature of EAPs as, first and foremost, workplace productivity programs instead of employee group health plans, and would help to assure that excepted EAPs have not been set up simply to evade compliance with mental health parity provisions and other protections provided by the PPACA.

On behalf of EAPA and its members, thank you for your consideration. We would welcome the opportunity to discuss these submitted comments or issues/questions raised by other comments in response to the proposed regulations.

Sincerely,

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