

Comments on Excepted Benefits

A Proposed Rule by the Internal Revenue Service, the Employee Benefits Security Administration, and the Health and Human Services Department

The members of the Employee Assistance Society of North America (EASNA) appreciate this opportunity to respond to the proposed rules that would amend the regulations regarding excepted benefits under the Employee Retirement Income Security Act of 1974, the Internal Revenue Code, and the Public Health Service Act. As the trade association for the employee assistance provider community, this issue is vitally important to our members.

Background on EASNA

Founded in 1985, EASNA's members represent Employee Assistance Programs (EAPs) of every size across North America, representing 80 million covered lives. EASNA advances the competitive excellence of its members by fostering best practices, research, education, and advocacy in behavioral health and wellness that affects workplace performance.

The diverse membership includes the following categories of individuals and organizations:

- EAP providers,
- benefits consultants,
- employers,
- wellness providers,
- EAP vendors,
- employee assistance and work/life professionals,
- behavioral health and addiction treatment practitioners, and
- human resource and benefits professionals.

How EAPs Have Evolved

The DuPont Corporation in 1942 began a program to assist returning war veterans with alcohol related problems. Since that time, EAP has grown to still serve the substance abuser but too, expand to assist other mental health issues. In addition, wellness and work-life services have been included to expand into a more a comprehensive program.

EAP continues its primary drug and alcohol focus with an emphasis on rehabilitating valued employees rather than terminating them for their substance abuse problems. At times, EAP coupled with an employer's disciplinary program provides constructive forms of care designed to restore the impaired employee. Throughout the decades, EAP sole purpose has been to help rehabilitate the impaired employee and dependents to return them to health and productivity, but the role of EAP has evolved, moving from sole rehabilitation to prevention, early identification, and rehabilitation.

Results of Having an EAP

Employers consistently experience a significant return on investment when providing EAP services for individual and families. Companies with EAPs experience increases in productivity and reductions in both absenteeism and presenteeism (employees who come to work but show reduced performance because of problems). Today, EAP support extends beyond mental health and substance abuse referrals.

Comments on the Proposed Rule

EAP services are, we believe, correctly classified as an excepted benefit as outlined in the Department of Labor's Technical Release No. 2013-03. We believe that EAPs offer a worker service, not a health benefit, that promotes a productive workforce. To encourage healthier employees, many employers offer EAPs to assist in developing healthier behaviors.

The proposed rule benefits provided under EAPs are excepted if four criteria are met. Below we offer these comments on each of them.

- 1. First, the program "cannot provide significant benefits in the nature of medical care. The Departments have invited comments on how to define "significant." Also asked is whether a program that provides no more than 10 outpatient visits for mental health or substance use disorder counseling, annual wellness assessments, immunizations, and diabetes counseling, with no inpatient care benefits, should be considered to provide significant benefits in the nature of medical care.*

EASNA does not support this criterion because currently there is no standard, accepted definition in the EAP field regarding "significant" benefits. In general, EAP services are limited in scope, not long term, and therefore are not typically considered "significant." However, we oppose defining this term through a strict numerical limit on EAP sessions because many EAP services are not provided by clinicians. EAPs are involved in three general categories: clinical, worklife, and wellness. These may include legal, financial, eldercare, childcare, education, and adoption issues. Companies may offer a limit on EAP sessions, whether behavioral health issues or non-behavioral health. There is no industry standard on the number available to an employee in a calendar year. EAPs typically offer referrals to the appropriate provider (whether medical or otherwise), so this is a relationship that is limited in scope that focuses on improvement in performance and productivity.

2. *The second criterion for an EAP to constitute excepted benefits is that its 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. *Moreover, participant eligibility for benefits under the EAP must not be dependent on participation in another group health plan.*
 - c. *Lastly, benefits under the EAP must not be financed by another group health plan.*

EASNA does not support this proposal. EAP is not a healthcare benefit and focuses on more than healthcare conditions. EAP is offered to all employees because it is a productivity tool. There is no cost to the employee, so the financing comment in item 2C is irrelevant. The third criterion for an EAP to constitute excepted benefits is that no employee premiums or contributions be required to participate in the EAP.

3. *The third criterion for an EAP to constitute excepted benefits is that no employee premiums or contributions be required to participate in the EAP.*

EASNA supports this proposal.

4. *The fourth criterion is that there is no cost sharing under the EAP.*

EASNA supports this proposal with respect to employees not being responsible for any cost sharing for EAP sessions.