

## MODEL "HOLD-HARMLESS" LANGUAGE

### *For Agreements Between Employers Sponsoring Self-Funded Group Health Plans and Their Third Party Administrators<sup>1</sup>*

#### **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 agreements 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

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<sup>1</sup> Defined terms should be amended, as needed, to conform to the other sections of the Agreement.

self-insured employer's health plan or any agreement between such employer and a TPA.

### 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 for the administration of the Plans in compliance with the Mental Health Parity and Addiction Equity Act ("MHPAEA") and all other Federal and state laws and regulations related to parity between mental health and substance use disorder ("MH/SUD") benefits and medical and surgical ("M/S") benefits (collectively, "Parity Laws"), including, without limitation, with respect to:

- (i) development and application of the non-quantitative treatment limitations of the Plans;
- (ii) as a fiduciary under ERISA, 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,
- (iii) disclosure requirements with respect to plan participants, beneficiaries and claimants (or their authorized representatives).

**(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 or willful misconduct of the TPA or its affiliates in the performance of the TPAs obligations under Section [ \_\_ ](1)(a), and (ii) any breach of Section [ \_\_ ] (1)(a) by TPA or its affiliates, including, without limitation, breach of fiduciary responsibilities.

**(1)(c)** Section [ \_\_ ] (1)(b) shall survive termination of this Agreement.

### End of Model Hold-Harmless Language