

CAMAR Spring 2010 Meeting
“Issues from Washington, D.C.”

Medicare Set-Asides
Employee Misclassification

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CAMAR Spring 2010 Meeting
Issues from Washington, D.C.

- Medicare Set-Asides
 - Historical Context
 - Program Metrics
 - MMSEA (2007)
 - Current (or Recent) Landscape
- Employee Misclassification
 - Definition of Issue
 - Federal Interest, State Activity
 - Approaches Applied or Considered
 - A Thought About Prevailing Methods

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Medicare Set-Asides

- Historical Context
 - Medicare a Secondary Payer for Liability, No-Fault and WC Claimants
 - Claim Settlements Must Protect Medicare’s Interest in Future Medical Expenses

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Medicare Set-Asides

- Historical Context
 - Medicare’s Interest to be Protected via “Set-Asides” in Settlements
 - Set-Asides Established on a Case-by-Case Basis, Subject to Review by Medicare (CMS)

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Medicare Set-Asides

- Historical Context
 - CMS Review Thresholds
 - Claimant a Medicare Beneficiary with a Settlement > \$25k
 - Claimant Had a “Reasonable Expectation” of Medicare Enrollment Within 30 months After Settlement, and Settlement Amount > \$250k

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Medicare Set-Asides

- Historical Context
 - “Reasonable Expectation”
 - Claimant Applied for Social Security Disability
 - Claimant Denied SSD but Considering Appealing
 - Claimant Appealing a Denial of, or Re-Filing for, SSD
 - Claimant Within 30 Months of Social Security Retirement Age
 - Claimant Has End Stage Renal Disease Condition

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Medicare Set-Asides

- Program Metrics
 - Prominent Issues Involved Delays in Settlements Awaiting CMS Approval, Differences of Opinion About Proper Set-Aside Amounts
 - CMS Information Base, Resources, Diligence in Identifying and Pursuing Set-Asides Was Imperfect

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Medicare Set-Asides

- Program Metrics
 - November 1, 2004 – November 1, 2005
 - 15,552 Completed Cases
 - Total Settlement Amounts \$1.57 Billion (\$101k per claim)
 - Proposed Medicare Set-Asides \$209 Million (\$14k per claim)
 - CMS's Recommended Set-Asides \$245 Million (\$16k per claim)
 - November 19, 2005 – April 30, 2006
 - 8,352 Completed Cases
 - Total Settlement Amounts \$831 Million (\$99k per claim)
 - Proposed Medicare Set-Asides \$150 Million (\$18k per claim)
 - CMS's Recommended Set-Asides \$158 Million (\$19k per claim)

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Medicare Set-Asides

- Medicare, Medicaid and SCHIP Extension Act of 2007
 - Mandatory Electronic Data Reports for Subject Claims
 - Penalty of \$1,000 per Day per Unreported Claim
 - Implementation Schedules Have Been Revised
 - For WC, Mandatory Reporting Was First July 1, 2009
 - Changed to January 1, 2010
 - Most Recently Revised to April 1, 2011

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Medicare Set-Asides

- Medicare, Medicaid and SCHIP Extension Act of 2007
 - 131 Data Elements (Includes Several "Reserved for Future Use")
 - Notable Inclusions:
 - Claimant Social Security Number
 - CMS Date of Incident and Industry Date of Incident
 - Often Different for Occupational Diseases
 - Up to 19 ICD9 Diagnosis Codes
 - Policyholder Names
 - Last, First, DBA, Legal
 - Insurance Contact
 - Department, Last Name, First Name, Phone, Phone Extension
 - Claimant Attorney's Tax ID Number
 - Estate/Beneficiary Information

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Medicare Set-Asides

- Current Landscape
 - Data Reporting Systems, Resources Under Construction
 - USA v. Stricker Lawsuit
 - Pollution Liability Class Action
 - \$300 Million Settlement, 20,000 Litigants
 - Lawsuit Raises Medicare Exposures for Post-Settlement Medical
 - Retroactive Authority to 1980 Based on 2003 Law Amendment
 - May Involve Double Damages if Successful
 - Viewed as Barometer of CMS Interest in Enforcing New Standards

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Medicare Set-Asides

- Current Landscape
 - Other Concerns
 - Retroactive Application of Potentially Powerful Database
 - Loss Development
 - Trend
 - Pollution Liability Class Action
 - Absence of Any "Safe Harbor" Against Future Actions for Unreported Claims
 - Synergies and/or Conflicts with Healthcare Reform, Economy

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Employee Misclassification

- Definition of Issue
 - Question of Employee (Eligible for Benefits, Subject to Premium Payment) vs. Independent Contractor (Not Covered or Included in Premium Base)

not
 - Assignment of Risk Classification(s) to Employers and/or Workers

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Employee Misclassification

- Definition of Issue
 - Common and Continuing Source of Conflict and Controversy
 - Claims Decisions
 - Premium Audits
 - Managing Expectations, Improving Predictability of Outcomes

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Employee Misclassification

- Definition of Issue

Impacts are Uncertain but Potentially Significant:

 - Construction Policy Research Center, 12/17/04 Estimate of Workers Compensation Premium Lost in Massachusetts - \$91 Million Annually
 - PCRB Replication of Above Project for Pennsylvania - 04/21/08 Estimate of Workers' Compensation Premium Lost in Pennsylvania - \$81 Million Annually
 - Fiscal Policy Institute Report - 01/25/07 Lost Workers Compensation Premiums in New York - \$500 Million to \$1 Billion per Year

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Employee Misclassification

- Federal Interest, State Activity
 - S. 3468 (2007-2008 U.S. Congress) "Employee Misclassification Prevention Act"
 - Introduced, Not Passed
 - Cosponsored by (Then) Senator Barack Obama
 - Recordkeeping Requirements
 - Notice to Employees/Non-Employees of Their Status
 - Penalties
 - Unemployment Insurance Audits Required to Address Misclassification

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Employee Misclassification

- Federal Interest, State Activity
 - The "List" Model
 - Similar to IRS Guidelines, Which Include Criteria for Such Determinations
 - Tests Used to Separate Employees From Independent Contractors (20 or More Components to Some Systems)

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Employee Misclassification

- Approaches Applied or Considered
 - Pennsylvania HB 400 (Under Consideration)
 - General Rule: Individuals engaged in commercial or residential building construction industry for remuneration are presumed to be employees unless:
 - **They have been and are free from control or direction over performance of such services both under contract and in fact,**
and
 - They are customarily engaged in an independently established trade, occupation, profession or business.

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Employee Misclassification

- Approaches Applied or Considered
 - Pennsylvania HB 400 – Criteria for Independent Contractor Status
 - Maintains a Separate Business Location
 - Operates Under Written Contracts
 - Includes Income and Losses From Services on Federal Income Tax Return
 - Incurs Main Expenses of Work Performed
 - Responsible for Satisfactory Completion of/Liable for Failure to Complete Work
 - Realizes Profits or Losses Under Contracts
 - Success/Failure of Business Depends on Relationship of Receipts to Expenditures
 - Owns or Leases (Not From Customer) Tools, Equipment to Perform Work
 - Advertises, Solicits or Otherwise Makes Services Available
 - Has Continuing Business Liabilities or Obligations
 - Has a Proprietary Interest in the Business
 - US Citizen or Authorized to Work in US

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Employee Misclassification

- Approaches Applied or Considered
 - Delaware Substitute No. 1 for Senate Bill 68 – 2007
 - For construction contractors, independent contractors and subcontractors **ARE SUBJECT TO THE WORKERS COMPENSATION LAW**
 - Up to 4 Executive Officers or Members of an LLC May Elect Not to be Covered
 - Certificates or Notice of Exemption Required to be Obtained by Contractors

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Employee Misclassification

- Approaches Applied or Considered
 - Delaware Substitute No. 1 for Senate Bill 68 – 2007
 - The distinction between employees and independent contractors that generally prevails in other states has been removed in Delaware- i.e.,
 - Both are eligible for benefits
 - Both are required to be insured and to have premium developed based on their exposures
 - Early Returns are – the approach really does seem to be working!

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Employee Misclassification

- A Thought About Prevailing Methods
 - The "List" Approach Does Not Cope Very Successfully With the Primary Determinant of Eligibility for Benefits – i.e., the Right of Direction and Control Over the Work Performed
 - In Many Instances the Process Effectively Compares a Snapshot(s) (Typically Taken At the Inception and/or End of a Policy or Contract) to an Extended Videotape (Which Unfolds as Work Progresses)
 - Things Can, and Do, Change (Even if Only Temporarily)
 - Benefit Determinations ARE SUPPOSED TO BE Liberally Construed to the Benefit of the Injured Worker
 - Instances Where the Snapshot Dictates Independent Contractor Status but the Section of Videotape Pertinent to an Injury Produces a Finding of Direction and Control are Almost Unavoidable

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Employee Misclassification

- A Thought About Prevailing Methods
 - The "All In" Approach Is Not Popular With Those Accustomed to Not Paying Workers Compensation Premiums, but May Be the Most Equitable System
 - In Considering This Question, Keep in Mind the Following Definition of an Independent Contractor, Coined (or Borrowed?) by a PCRB Employee With Decades of Experience in Hearing and Attempting to Resolve Such Matters:

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Employee Misclassification

- An Independent Contractor Is:

Someone who hasn't been injured.....yet.
