



Federal Workers' Compensation Issues Update

by Douglas J. Holmes, President

UWC—Strategic Services
on Unemployment & Workers' Compensation

April 1, 2014



Federal Impacts on WC

- HR 1982 MSP Workers' Compensation Settlement Agreements Act of 2013 Reichert (R-WA) and Thompson (D-CA).
- CMS Advance Notice of Proposed Rule Making (CMS 6047) on use of set-asides for liability.
- CMS WCMSA Re-review Revisions – Comments
- HR1845 Strengthening Medicare and Repaying Taxpayers Act (SMART) Implementation

CMS Portal determination of Conditional Payment Amounts - Rules

Civil Money Penalty for Failure to File Section 111 Reports - Rules

Appeals of Conditional Payment Reimbursement Amounts - Rules

Alternatives to SSN to be used in reporting – policy pending

Thresholds for Section 111 reporting - Rules



Federal Impacts on WC

- ICD-10 Implementation October 1, 2014
- President Obama's FY 2015 Budget
 - Access to WC information for Social Security to more accurately determine SSDI/WC offset
 - Increased Review of Defense Base Act claims
 - FECA Reform to Save Money
 - TRIA extension funding
- OSHA Reporting Expansion
- Longshore Act Reform ?



MSP WC Settlement Agreements Act of 2013

- HR 1982(Reichert R-WA and Thompson D-CA).
- Broad support from stakeholder groups
 - AIA, PCI
 - National Council of Self Insurers
 - UWC
 - State chambers and self-insurers
 - Worker Injury Law Advocacy Group (WILG) and AAJ
 - American Bar Association



MSP WC Settlement Agreements Act of 2013

- Certainty for calculating the amounts in set-asides
- Clear criteria for when a set-aside may be reviewed
- Reasonable time frame review of set-asides
- Appeals process for parties to CMS determinations
- Optional direct payment of set-aside amounts to Medicare
- Assure that settlements that meet the terms of federal statute at the time of settlement are not disapproved based on later changes in law, regulations or administrative interpretations by CMS



MSP WC Settlement Agreements Act of 2013

- Potential inclusion as section in Medicare Sustainable Growth Rate (SGR) legislation later in 2014
- Optional Direct Payment option would provide increased revenue for Medicare in 10 year budget period
- Codifies some features of CMS policy while addressing issues of WC law control, appeals and time frames for determinations
- House Ways and Means, Energy and Commerce and Senate Finance staff engaged in review



WCMSA Issues

- CMS Advance Notice of Proposed Rule Making (CMS 6047) on use of set-asides for liability
- Overwhelming opposition to use of MSAs from the Insurance industry and plaintiffs counsel
 - Liability much different than workers' comp
 - Current WC MSAs not working well
 - Lack of capacity and expertise at CMS and with contractors
 - Increased cost to settlements



WCMSA Issues

- CMS WCMSA Re-review Revisions – Comments due by March 31, 2014
- Expanded Re-Review Generally Supported
- Issues in administration
 - Too much discretion by CMS to pick and choose only certain cases for re-review
 - Unnecessary time limitation to request review
 - Expertise needed for review outside current contractor
 - Need to work with WC determinations rather than second guess WC future medical determinations



SMART Act Implementation

- HR1845 Strengthening Medicare and Repaying Taxpayers Act (SMART) Implementation
- Interim Final Rule filed in 2013 on Obtaining Final MSP Conditional Payment Amount via Web Portal
 - Time frame for determination in statute set at 120 days but rule provides CMS up to 215 days
 - Exceptions to meeting the time frame greatly expanded in IFR to systems issues and virtually anything CMS deems to be beyond its control



SMART Act Implementation

- Civil Money Penalty for Failure to File Section 111 Reports – Comments filed by February 10, 2014
 - Impose only for intentional failure to respond
 - Fit the sanction to the nature of the failure
 - \$1,000 per day fine too high for quarterly report failure
 - Collaboration rather than confrontation



SMART Act Implementation

- Appeals of Conditional Payment Reimbursement Amounts – Comments filed by February 25, 2014
 - No limitation on the issues that may be appealed
 - The determination that a WC plan is required to reimburse instead of an individual or another plan should be appealable
 - The appeals provisions in place for beneficiaries do not neatly fit for conditional payment reimbursement appeals



SMART Act Implementation

- Thresholds for Section 111 reporting
 - Thresholds determined each year for liability reporting but not required for workers compensation or no-fault reporting
 - Computations of thresholds for WC may be on the horizon administratively
 - Current WC thresholds for reporting remain in place ; generally medical only TPOCs of \$750 or less

Alternatives to SSN to be used in reporting – policy pending



ICD-10 Implementation

October 1, 2014

- Transition for ICD-9 to ICD-10
- Many more codes for ICD-10
- Cross-walk definitions are not all aligned
- Systems issues have been in development for some time
- Administrative issues for Section 111 reporting
 - Sanction for failure to use correct code
 - When in doubt, guess?
 - Impact of codes on conditional payment recovery statements
 - Alignment with state WC coding



President Obama's FY 2015 Budget

- Access to WC information for Social Security to more accurately determine SSDI/WC offset
 - Concern about expanded use by SSDI
 - Reverse offset in 15 states at risk?
- Increased Review of Defense Base Act claims
 - Fall back from proposal to transition to self-insurance with captive administration
 - Continued interest by DOD and Rep. Cummings in self administration of DBA claims



President Obama's FY 2015 Budget

- FECA Reform to Save Money
 - Require individuals to transition to age and service retirement
 - Opposition from federal worker unions
- TRIA extension funding
 - Earmarks funding for TRIA extension
 - Notes that administration will work with whatever legislation may be enacted



OSHA Reporting Expansion

- ANPRM published for comment on November 8, 2014 – comments initially due February 6, 2014 but extended due to significant response
- Establishment-specific data with lesser confidentiality
- Requires data on injury and illness classifications not currently available from any source, including BLS
- Includes case-specific data for injuries and illnesses that do not involve days away from work
- Suggested under reporting of job injuries
- Increased oversight and attention to reporting for statistical purposes could impact reporting of injuries and illnesses for which WC claims are filed



Longshore Reform

- Interest in Longshore Act Reform on hold, although Senator Isakson may reintroduce reforms previously proposed in S 669 the Senate majority changes
- Reforms would include many addressed in state workers' compensation reforms (e.g. choice of physicians, evidence based medicine, compensation rates, utilization reviews, etc.)
- S 669 would eliminate dual jurisdiction issues as a matter of federal law instead of relying on state by state law changes (VA and NJ recently addressed)



Legislative/Policy Outlook for 2014/15

- HHS/CMS will proceed with rulemaking to expand its discretion to assert its interest in WC settlements.
- Increased coordination of CMS collection efforts with Section 111 reporting information and less flexibility in modifying future medical amounts that are “potentially” recoverable
- Increased costs for state workers’ compensation agencies and parties to settlements
- Fewer settlements due to cost and risk
- Increased use of case law precedent in the absence of clear statutory guidance to address state/federal conflicts of law



Legislative/Policy Outlook for 2014 /2015

- Review of ways to reduce cost and/or increase revenue for SSDI and Medicare
- ACA implementation will create new cost pressures on the delivery of medical services to a broader population. Without expanded resources, the availability and quality of health care for workers covered under WC law may be impacted, particularly in states and local areas with capacity issues