



Federal Developments Impacting Workers' Compensation

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Issues Impacting Workers' Compensation

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Impacts on Workers' Compensation

- National Commission on State Workers' Compensation Laws Act of 2009 (HR 635)
- Reporting requirements under Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (S 2499)
- Health Insurance Reform Impacts on State Workers' Compensation
- Continuing WCMSA Reform Initiative (HR 2641)
- Response to Section 111 Reporting and Conditional Payment Recovery Issues (HR 4796)



Impacts on Workers' Compensation

- Misclassification Issues - NCOIL Model State Misclassification Legislation, Administration Initiative, GAO Study, McDermott HR 3408 and Kerry S 2882
- Protecting America's Workers Act, Woolsey HR 2067
- NAIC – 24 Hour Coverage Model Act
- Hearings on OSHA reform and federal standards for state workers' comp. –OSHA data GAO studies



HR 635 Provisions

- Establish National Commission of 14 members: President appoints the Chairman, 1 appointed by Senate majority leader to serve as Vice Chairman, 2 appointed by House Majority Leader, 2 appointed by House Minority Leader, 2 appointed by Senate Majority Leader, 2 appointed by Senate Minority Leader, 4 cabinet Secretaries from Labor, Commerce, HHS, and Education.
- Politically unbalanced with a change agenda



Commission Duties

- Review findings of previous 1972 National Commission Report
- Study and evaluate state WC laws to determine if they provide adequate, prompt and equitable system of compensation for injury or death arising out of or in the course of employment
- Study and evaluate whether additional remedies should be recommended to ensure prompt and good faith payment of benefits and medical care to injured workers and their families.



Specific Items to be studied and evaluated

- Amount of permanent and temporary disability benefits and criteria for maximums
- Adequate, prompt and equitable system of comp. and medical care
- Alternatives to reduce or eliminate bad faith delays, discouraging misclassification of workers as independent contractors and/or leased employees to avoid paying WC benefits
- Amount and duration of medical benefits, adequacy of medical care and free choice of physician
- Rehabilitation



Specific Items to be Studied and Evaluated

- Standards to determine assurance of benefits caused by aggravation or acceleration of pre-existing injuries or disease
- Time limits on filing claims; waiting periods; compulsory or elective coverage; administration; ensuring prompt hearings and due process evidentiary rights in the resolution of claims;
- Relationship between WC, old age, disability, and survivors insurance and other insurance



Recent State Reforms Not on List for Review

- Use of employer/insurer selected networks to improve treatment outcomes
- Utilization Review
- Use of science based information to determine percent of impairment (AMA Guides)
- Managed care programs
- Focus on return to work treatments and strategies
- Cost of workers' compensation premiums/payments and impact on competitiveness
- Fraud



Fundamental Issues

- Review of state WC system not the federal role
- State WC system already continuously studied and evaluated
- Unnecessary federal spending in time of tight federal budget
- Trial lawyers (WILG and AAJ) and organized labor seeking changes on issues rejected by states
- Many 1972 Report recommendations would impose significant cost and premium increases for employers



Status of HR 635

- 17 co-sponsors – all Ds, but continuing to grow
- On the list of priority bills for the Majority
- Business Coalition formed early to oppose – urged House Republicans to object to moving on suspension calendar – so far so good
- Established policy/technical group to rebut proponents and respond in the press (e.g. Washington Post and New York Times stories)
- Be prepared to respond from grass roots to members of Congress



S 2499 Section 111 Reporting

- Enacted during last day of Senate session in 2007
- Projected to produce \$1.1 billion in revenue for Medicare over 10 years; CMS expects much greater revenue as reporting is implemented
- Requires WC insurance companies and plans of insurance to report all judgments, settlements, awards and payments of WC to individuals who are Medicare entitled (No-fault auto and liability insurers also required to report)



S 2499 Section 111 Reporting (cont'd)

- Interim Report Record Lay-outs available from CMS along with User Guide 3.0 and training – updated version scheduled for release July 1st
<http://www.cms.hhs.gov/MandatoryInsRep/Downloads/NGHPUserGuideV3022210.pdf>
- Implementation through CMS web site
- Considerable definitional and system issues have delayed implementation from July 1, 2009 to April 1, 2010, and then moved back to scheduled production in the first quarter of 2011.



CMS New S 2499 Reporting Issues

Required TPOC reports moved back to October 1, 2010 and thereafter

Required ORMs as of January 1, 2010

Thresholds for reporting ongoing responsibility for medical (ORM) payments – through December 2011, reporting not required if for medicals only, lost time maximum under the WC law or no more than 7 days if no WC law limit, payments directly to medical provider, and total payment does not exceed \$750.



Other Reporting Issues

- Reporting responsibility for deductibles and excess insurance update Feb. 24th a late change to require that payments made for deductibles made within policies the responsibility of the insurer under the policy instead of the employer making payment.
- Compliance requirements to register, test and be ready for production to avoid penalty.
<http://www.cms.hhs.gov/MandatoryInsRep/Downloads/NGHPCComplianceAlert022410.pdf>
- Clinical trials, foreign insurers, mass torts requirements still being finalized
<http://www.cms.hhs.gov/MandatoryInsRep/Downloads/NGHPAlertRiskMgmt022410.pdf>



Costs of S 2499 Reporting

- Increased risk that old settlements will be reviewed with changes in Medicare recovery, increasing potential costs
- Administrative costs of reporting is significant for insurance carriers, self-insurers, state and federal agencies
- Increases in risk and prospective costs of WC where Medicare interests involved



HR 2641 WCMSA Settlement Reform

- Introduced by Rep. John Tanner (D- TN)
- WC settlement exempt from MSP if 1) present value of \$25,000 or less; 2) likely ineligibility for Medicare; 3) no future medical expenses; or 4) no limit on future medical



HR 2641

- MSP satisfied when set aside amounts based on items and services under WC agreement and/or fee schedules, and reduced by direct costs of establishing and administering the WCMSA and costs of attorneys, TPAs, or administrators.



HR 2641

- CMS Decisions within 60 days of submission with specific reasons if disapproved
- Safe harbor for submissions if 10% of present value of claim submitted as long as settlement is \$250,000 or less
- Reconsideration of disapproval may be filed within 60 days; reconsideration within 30 days; appeal within 30 days to ALJ; decision within 90 days of appeal; judicial review
- Optional direct pay to CMS



HR 2641

- Optional compromise settlement
- WC law shall be conclusive as to matters under WC law and not subject to CMS review – particularly helpful in determining prescription drug amounts to be set-aside in light of CMS policy of requiring average wholesale prices
- No additional liability for a WC settlement agreement effective prior to enactment of HR 2641 than on effective date of the agreement



Status of HR 2641

- Rep. Tanner retiring from House – looking for new champion for the bill
- Working with Representative Stark, Senator Stabenow and discussions with HHS/CMS
- Revising to eliminate cost/scoring issues to make it revenue neutral
- MSP may be addressed in GAO Report
- Coordinating with HR 4796 to address Section 111 Reporting and Conditional Payment issues for WC and Liability.



Impact of Health Insurance Bill on WC

- HR 3590 contains few provisions directly impacting WC because of employer and insurance industry. Successfully opposed 1) amendment to create private cause of action for attorneys to recover conditional payment reimbursement, and 2) “24 Hour Coverage” provisions.
- Section 1556 provides survivor benefit without a requirement to prove death due to black lung, reinstates rebuttable presumption of total disability and/or death due to black lung if miner had 15 or more years of underground mine employment.



Impact of Health Insurance Bill on WC

- Section 10109 provides for development of national standards by HHS to enable exchange of financial and administrative transactions for health care system.
- By January 1, 2012, Secretary must seek input on whether standards and operating rules should apply to health care transactions of auto insurance, workers' compensation and other programs or persons
- HHS must solicit input from “standard setting organizations and stakeholders as determined appropriate by the Secretary”.



Section 111 Reporting and Conditional Payment

- HR 4796 Introduced by Rep. Patrick Murphy (D-PA) and Tim Murphy (R-PA)
- Providing a specific time frame and process in determining MSP required conditional payment reimbursements before settlements
- A right of appeal for Non-Group Health Plans on MSP conditional payment obligations
- Sensible MSP Recovery Thresholds
- Establishing a modest user fee to assure that the bill does not raise a scoring issue



HR 4796

- Taking Social Security Numbers (SSN) and Health Insurance Card Numbers (HICN) Out of the Reporting Process
- Setting a three year Statute of Limitations for legal actions seeking conditional payment reimbursement under MSP
- Establishing safe harbors and clarity with respect to MMSEA §111 reporting penalties



Outlook for 2010, and thereafter

- HR 635 will re-emerge as more co-sponsors are recruited and the House turns to other issues after Health Insurance Reform and the Jobs bill.
- Legislative time is getting very short, so expect a last minute rush of legislative activity before House and Senate leave for campaigns.
- Majority could continue to push during post election session even if they lose the majority effective in 2011.
- Possible new effort to change WC/SSDI offset and repeal no longer recognized state reverse offsets



Outlook for 2010, and thereafter

- Educating Congress on HR 4796 and HR 2641 continues through 2010 with coordinated effort to increase sponsors and seek reform of CMS practices and procedures.
- As Section 111 implementation progresses many administrative issues will be resolved, but a number are likely to require legislation, regulation and/or litigation to resolve
- MSP issues, including WCMSAs and conditional payment reform will become increasingly important as CMS strives to increase revenue