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What You Need to Know about Medicare Reporting Requirements

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Many employers carry Employment Practices Liability Insurance ("EPLI") and work with their EPLI carriers when settling claims with current or former employees (for purposes of this article, let's refer to them as "claimants"). And when those settlements are being structured, perhaps the last thing any party is considering is Medicare reporting requirements. But for the unwary EPLI carrier or self-insured employer, the failure to consider those reporting requirements can lead to significant penalties and even future litigation.

The potential issues arise when a claimant includes a claim for emotional distress as part of his or her damages. If the employee asserting that claim is a Medicare beneficiary, then the EPLI carrier or self-insured employer must abide by the reporting requirements set forth in Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (the "MMSEA").

What is required by the MMSEA?

The MMSEA requires liability insurers (including self-insurers), no-fault insurers, and workers' compensation insurers (otherwise known as Responsible Reporting Entities) to do several things:

- (1) determine whether a claimant is entitled to Medicare benefits; and
- (2) submit to the Centers for Medicare & Medicaid Services ("CMS") information regarding the resolution of a claim where the claimant "is a Medicare beneficiary and payments for medical care . . . are claimed and/or released, or the settlement, judgment,

award, or other payment has the effect of releasing medicals."

What is the Purpose of the MMSEA Reporting Requirements?

These reporting requirements tie into the Medicare Secondary Payer law, which states for purposes of this context that Medicare may not make payment with respect to any claimant's medical care if "payment has been made or can reasonably be expected to be made under a . . . liability insurance policy or plan (including self-insured plan)." 42 U.S.C. § 1395y(b)(2)(A)(ii). This law, however, does permit Medicare to make *conditional* payments for a claimant's medical care if the liability insurer (including a self-insured plan) "has not made or cannot reasonably be expected to make payment with respect to such [medical care] promptly. . . ." 42 U.S.C. 1395y(b)(2)(B)(i).

Though sounding perhaps overly technical, the law serves a rather common sense purpose. If certain types of insurance cover a medical claim, then the insurance plan (and not Medicare) should be the primary party to pay for the medical care. Medicare, as the law's name suggests, is the secondary payer. In the employment litigation context, however, the very issue of whether the Responsible Reporting Entity, such as an EPLI carrier or self-insured employer, is responsible for paying medical costs may be one of the issues being litigated. In those instances, the EPLI carrier (or self-insured) is not promptly paying for the medical care that a Medicare-eligible claimant alleges was caused by the defendant's misconduct, and Medicare steps in to make conditional payments for the medical care while the litigation is ongoing. But after the litigation settles, then the Medicare Secondary Payer law entitles Medicare to recover its conditional payments from any settlement, judgment, award or other payment that the claimant obtains.

Medicare's requirements go beyond this, however. When a claim involving a Medicare beneficiary is settled, Medicare not only expects to recover its pre-settlement conditional payments from the settlement funds, but also expects the settlement funds to be sufficient to cover any *future* (*i.e.*, post-settlement) claim-related medical care. Medicare takes the position that with respect to any settlement, the parties must reasonably protect and consider Medicare's future interests because Medicare does not want to be "on the hook" for payment of any post-settlement, claim-related medical care. It wants to maintain its second payer status as much as possible. While Medicare's stance is that its future interests must be considered and protected in any settlement, Medicare has not provided any clear methodology on how parties are to protect Medicare's interests with respect to future medical costs.

Consequences of Non-Compliance

A Responsible Reporting Entity that fails to comply with the MMSEA's reporting requirements is subject to penalties of \$1,000.00 for *each day* of noncompliance with respect to each claimant.

Furthermore, if Medicare does not receive reimbursement of its conditional payments, Medicare can bring a lawsuit directly against the liability insurer (or self-insured), as well as against the Medicare beneficiary and his or her attorney. Moreover, in the event Medicare is forced to bring suit to recover its conditional payments, it is entitled to recover double damages, plus interest.

What Should EPLI Carriers and Self-Insured Employer's Handling EPLI Claims Do?

To avoid running afoul of the MMSEA's reporting requirements, EPLI carriers and self-insured employers handling EPLI claims should have procedures in place to identify any claims that could trigger the MMSEA's reporting requirements. That is, there should be mechanisms in place to determine whether the claimant is Medicare eligible and whether he or she is claiming damages for any Medicare-covered items or services.

If the MMSEA's reporting requirements are triggered, then the EPLI carrier or self-insured employer should have guidelines in place to ensure that CMS is promptly notified of the resolution of any such claims and that upon resolution of the claim, Medicare is reimbursed for any conditional payments.

Lastly, although Medicare has not provided any clear methodology on how to protect its interests with respect to future medical costs, Medicare has released information on certain "proposed options" on the subject in an Advance Notice of Proposed Rulemaking published on June 15, 2012. Interested parties had through August 14, 2012, to submit their comments on the "proposed options." Until clear guidelines on the subject are provided, when settling an MMSEA reportable claim, an EPLI carrier or self-insured employer should nonetheless have systems in place to make certain that it considers and protects Medicare's future interests and document its claim file accordingly.

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