



Federal Legislation and Developments Affecting Workers' Compensation and Insurance

by Douglas J. Holmes, President

UWC – Strategic Services
On Unemployment & Workers' Compensation

November 20, 2008

Norfolk, Virginia



About UWC

Established 1933

*“The Voice of Business on
Unemployment & Workers’ Compensation”*

Only association exclusively devoted to lobbying for *business* on national workers’ compensation and unemployment insurance issues

- Lobbying
- Support for state lobbying organizations
- National professional society
- Employers, insurers, service providers, law firms, state administrative agencies, and associations
- Research/education arm is the National Foundation for Unemployment Compensation & Workers’ Compensation





Federal Impacts on WC and Insurance

- Workers' Compensation Medicare Set-Aside Arrangements
- New Reporting Requirements under Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (S 2499)
- Social Security Disability and Workers' Compensation Offset and Reverse Offset Provisions
- Prospects for 2009 and 2010



Workers' Comp. Medicare Set-Asides

- Voluntary arrangements by parties to a WC settlement to assure that Medicare's interests in WC settlements are addressed and Medicare is secondary to WC.
- CMS established guidance through six statements since 2001.
- Approval of WCMSA submissions to CMS is the only method accepted under CMS guidances to assure that parties are not at risk of later liability and recovery actions by CMS.



MSP Issues to be Addressed

- Set-aside review procedures impose burdens on workers, payers, attorneys, WC systems
- Administrative delay – 1,061 in “Await CMS” in Mich.
- Inconsistency and unpredictability
- Set-aside amounts > WC requirements
- Workers receive less cash benefits or may not reach settlement agreement
- Significant costs to payer
- Cost shift from Medicare to WC settlement parties



Added WC Costs For Settlement

- Comp benefits payable pending CMS decision; review of settlement held in abeyance
- Funding for care not due
- Funding for care not covered by Medicare
- Funding amount > WC fee schedules
- Full set-aside despite disputed liability
- Fees to prepare, review and administer set-aside
- Insurers obligated to cover 100% of potential costs pending resolution with CMS



Legislative Reform Goals – HR 2549

- No CMS review where cost < benefit
- Streamline CMS approval process
- Establish appeal process
- Rational, consistent and efficient procedures
- Reinforce that WC laws determine existence and amount of **primary** obligation
- Medicare shares cost of protecting its interest
- Provide clear legal authority for set-asides



Coalition Members

- American Bar Association
- American Insurance Association
- National Council of Self-Insurers
- Property Casualty Insurance Ass'n
- State bars & self-insurance associations
- UWC
- Worker Injury Litigation and Advocacy Group (WILG)
- American Association for Justice



H.R. 2549

- H.R. 2549 introduced in the House of Representatives May 25, 2007
- Legislative language the same as HR 5309 introduced in 2006 with the exception of deletion of the 15% of medical safe harbor in favor of a single 10% of total settlement safe harbor for the set aside amount.
- “Medicare Secondary Payer and Workers’ Compensation Settlement Agreements Act of 2007”



H.R. 2549 - Overview

- WC laws remain primary – no change in obligation to pay all reasonable & necessary medical
- Provide legal authority for set-asides
- Exempt settlements under \$250,000 or no future medical
- Provide 10% of total settlement safe harbor
- Provide quick and efficient review process
- Clarify terms and procedures
- Allow set-aside to be paid into Medicare
- Provide deadline for conditional payment determinations
- Provide administrative appeals process
- Protect old settlements



Outlook for HR 2549

- 23 bi-partisan sponsors and co-sponsors, many from powerful Ways & Means Committee (as of 9/15/08)
- Rep. Tanner plans to introduce legislation again with continuing coalition support
- Action dependent on continuity of effort, more complete CMS info, CBO scoring, no formal opposition from organized labor.
- Some elements (e.g. safe harbor and/or threshold) are likely to be revised.



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
- Requires plans of insurance, including workers compensation laws and plans to report all judgments, settlements, awards and payments of WC to individuals who are Medicare entitled
- Responsible Reporting Entities (RREs) include insurance carriers, self-insured employers, and federal and state agencies. TPAs may not be RREs but may be registered by RREs as agents to submit reports on behalf of RREs.



S 2499 Reporting (cont.)

- Registration of RREs begins May 1, 2009
- Reports due beginning July 1, 2009
- Report Record Lay-outs in development through December
- Regular teleconferences and Q and A by CMS through CMS web site
- No formal regulations to be issued for comment
- No formal administrative appeal



CMS New S 2499 Reporting Issues

Definition of Medicare Entitlement
www.cms.hhs.gov/MandatoryInsRep.
CMS gathering info to reach back for
recovery and create set-asides
Reporting burden is significant
No thresholds or safe harbors



Other Reporting Issues

- Report payments made after July 1, 2009 must be reported even if based on settlements, awards or judgments prior to July 1, 2009
- Only required to report Medicare Eligible – CMS is in the process of determining access to CMS data base for access by Responsible Reporting Entities (RREs)
- \$1,000 per day fine for failing to report will not be imposed until reporting registration and standards are finalized



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 significant for insurance carriers, self-insurers, state and federal agencies
- Increases in prospective costs of WC where Medicare interests involved



Outlook for 2009, 2010, and thereafter

- Registration and development of reporting requirements and implementation will continue through 2009
- Active enforcement and penalties imposed beginning in 2010
- Significant additional Medicare recoveries and cost avoidance above \$1.1 billion, shifting Medicare costs to WC and insurance industry



SSDI and Workers' Compensation Offsets

- President Bush's 2009 Budget Proposed Reform
- Senate Finance Committee developing options for legislation in 2009
- Current SSDI/WC Offset in federal law offsets amounts from SSDI to the extent that total of SSDI and WC payments exceed 80% of average current earnings on which SSDI based
- GAO 2001 study found lack of information about WC payments caused significant overpayments and underpayments of SSDI



SSDI/WC Offset Issues

Modification of SSDI/WC offset in federal law will likely shift costs to insurance carriers, self-insurers, states and federal agencies making WC payments

Significant administrative costs in transition

States with reverse offset provisions will incur added costs of WC settlements and admin

New federal reporting to identify SSDI entitled with WC payments will add admin burden



SSDI/WD Offset Prospects for 2009 and 2010

- Social Security projected deficits will increase pressure to modify offset and to identify cases in which SSDI offsets were missed.
- Congress will review CMS Medicare reporting implementation as model for SSDI reporting
- Potential revision in SSDI acceptance of structured settlements developed to avoid offset by spreading WC payments for life expectancy without taking time value of money into account



Employers Play Crucial Role

- Understanding and explaining the impact on employers and insurance carriers.
- Understanding and explaining the proper interfacing of WC systems and insurance with Medicare and SSDI.
- Taking Federal impacts on WC into consideration in cost and budget projections



Join US

UWC -- Strategic Services on Unemployment & Workers' Compensation

“The Voice of Business on Unemployment & Workers' Compensation”

910 17th Street, NW, Suite 315
Washington, DC 20006
holmesd@UWCstrategy.org

www.UWCstrategy.org
202-223-8904