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ATTORNEYS AT LAW



**Guiding you toward Medicare Compliance**

**Medicare Issues in Workers' Compensation  
Settlements**

**PRESENTED BY: MICHELLE A. ALLAN, ESQ.**

# Medicare Basics

- Medicare is a health insurance program provided by the federal government for:
  - People 65 years of age or older; or
  - People with disabilities under the age of 65 who have been in receipt of Social Security Disability benefits for at least 24 months; or
  - People with End-Stage Renal Disease or Lou Gehrig's Disease

## The Medicare Secondary Payer Act

- Under 42 USC 1395(y) and CFR § 411.1-37 Medicare reserves the right to remain a secondary payer in the context of workers' compensation and liability claims where a primary payer (plan) exists.

## MSP Defined Primary Plans

- According to 42 U.S.C. 1395y(b)(2)(A), a primary plan includes:
  - Liability insurance
  - No Fault insurance
  - Automobile insurance
  - Self insurance
  - Workers' compensation insurance

## Medicare's enforcement rights

- Under the MSP, Medicare has the right to terminate a Claimant's benefits if Medicare's interests are not considered in a settlement
- The Centers for Medicare and Medicaid Services (CMS) may also initiate recovery upon learning that payment has been made or could have been made under a primary plan against any and all parties to settlement (42 CFR 411.24(b), (e) and (g) and 42 CFR 411.26).
- The amount of recovery in a Medicare action can be the amount of the Medicare primary payment or; **DOUBLE** the amount of the payment Medicare made as a primary payer.

# Medicare Compliance areas:

- **Liens (past)**
  - Recovery asserted by Medicare for conditional medical payments made by Medicare pre-settlement
- **Reporting 2007 Extension Act (present)**
  - Requires a “timely” reporting to the DHHS of a settlement, judgment or award to a Medicare eligible claimant
  - \$1,000 penalty per claim per day for non-compliance
- **Medicare Set-Asides (future)**
  - Medicare’s mechanism of protection
  - Medicare’s future interests in a monetary fund designed to pay for claim-related, covered medical expenses that occur post-settlement
  - Thresholds?

## Addressing Medicare liens

- Pursuant to the MSP all parties to the settlement are potentially liable to Medicare for pre-settlement medical payments made by Medicare for a Claimant's claim-related treatment
- To protect Medicare's statutory rights and the parties from liability, a lien inquiry should be made to determine whether any Medicare conditional payments have been made and need to be repaid.

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ATTORNEY AT LAW  
82 CHURCH ST  
NASHVILLE TN 37201



Beneficiary:  
Medicare Number:  
Date of Incident:

Dear ATTORNEY AT LAW:

We have received check number 1042 in the amount of \$29.62.

This amount has been applied to the outstanding debt due Medicare. The principal amount of the debt and interest (if applicable) has been reduced to zero and our file is being closed.

RCAFP1

## Medicare Secondary Payer Mandatory Reporting

- The 2007 Extension Act requires a “timely” reporting to DHHS of a settlement, judgment or award to a Medicare-eligible Applicant
- Reporting is now scheduled to begin January 1, 2011
- Same statutory reporting requirement previously published under the MSP
- \$1,000 penalty per claim per day for non-compliance to self-insured or insurance company
- No published damages against Claimant/Claimant’s attorney (opposite of MSP generally)

## Medicare Set-Asides (MSA)

- A projection of the Medicare-covered medical expenses and Medicare-covered prescription drug expenses that a Claimant will require for treatment of his/her claim related injury over the duration of his/her life expectancy.
- It differs from a life care plan in that it only deals with a “reasonable” amount of Medicare-covered medical expenses.

# Protecting Medicare's Interest

- Only Medicare itself can determine whether its interest has been protected
- Parties may not take this into their own hands
- Medicare determines its review thresholds

## When CMS approval of an MSA is required for a workers' compensation claim

- When settling a workers' compensation claim, an MSA is necessary if the future medical aspect of the claim is being settled and one of the following exists:
  - The injured worker is, at the time of settlement, eligible for Medicare benefits (and the settlement amount is more than \$25,000).
  - The settlement amount exceeds \$250,000 and the injured worker can reasonably expect to become Medicare eligible within thirty (30) months of the settlement.

## Prescriptions and their effect on MSAs

- Medicare requires that prescription medications be included in all submitted MSAs
  - Off label?
  - Generics?
  - Doctor's reports?
  - Pharmacy printouts?
  - Weaning and tapering?

# Stumbling blocks in the approval process

Requests for updated information

Requests for pharmaceutical printouts

Requests for Court orders

Requests for current claims payment histories

The goal is to avoid stumbling blocks with CMS approval by anticipating Medicare's needs prior to submission and addressing those needs from the start.

## What obligations exist in settlement of workers' compensation claims that do not require Medicare approval?

- Must still consider Medicare's interest (July 11, 2005 Memo)
- Even if a Claimant is not yet a Medicare beneficiary, and/or does not meet the CMS thresholds for review of a MSA proposal, they must consider and protect Medicare's interest.
- We suggest that the future Medicare-covered medical expenses related to the claim be projected and reflected in the settlement agreement even if formal approval is not required.

## Make sure your settlement agreement is properly drafted.

- The settlement document should:
  1. State that Medicare's interest has been considered.
  2. Contain language where the Claimant acknowledges his understanding of the Medicare issues.
  3. State legitimately that the injured employee is not expected to incur any further medical costs covered by Medicare or provide for an amount specifically allocated to cover future health costs attributable to the injury which would be covered by Medicare.
  4. Attempt to limit the injury-related condition.

## Using a rated age

Often provides for a reduced life expectancy and thus decreases the amount of the set-aside

## Using an annuity

- Costs of funding the set-aside can be significantly reduced.
- Annuity payments can be kept by Claimant after annuity payout has reached set-aside amount approved by Medicare.

## Example: Cost Savings with an Annuity

- Mr. Jones settles his workers' compensation case for \$50,000, plus the cost to fund a Medicare Set-Aside Account.
- The Medicare Set-Aside is anticipated to require \$208,576.
- The cost of an annuity to fund the MSA is \$71,333, plus seed money in the amount of \$10,913, totaling \$82,246.
- By funding the MSA with an annuity, there is a savings of \$126,330. ( $\$208,576 - \$82,246 = \$126,330$ )

## Computing Total Settlement Amount

- The computation of the total settlement amount includes, but is not limited to, wages, attorney fees, all future medical expenses (including prescription drugs), and repayment of any Medicare conditional payments.
- Also, any previously settled portion of the WC claim must be included in computing the total settlement amount.

*CMS April 25, 2006 memorandum*

## Can settlement be crafted to avoid CMS obligations?

- Example: Attempt to break down a workers' compensation settlement for \$35,000 into two (2) separate settlements for \$11,000 and \$24,000, in order to circumvent Medicare approval process.
- Example: Indemnity/Medical Settlement for \$24,000. Claimant is Medicare-eligible. No need for approval?

## Administration of MSA Account

- Self Administration
  - Interest-bearing account
  - Managed by Claimant
  - Reports filed by Claimant
- Professional Administration
  - Fee schedule pricing

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## Burns White Medicare Compliance Services

- Initial Medicare Set-Aside Consultation
- Accurate Medicare Set-Aside Allocations
- Medical Cost Projections
- Medicare Legal Reviews and/or Legal Advice
- Advice on Set-Aside Funding
- Social Security Verifications
- Strategic Settlements Consultations
- Obtaining Medicare Approval
- Negotiation of Approval with Medicare
- Medicare Lien Verification
- Settlement Process Facilitation, including Development of Necessary Settlement Language
- Medical Expertise from On-Staff Nurses
- Educational Services and Seminars
- Professional Administration Information
- Prescription Drug Evaluations
- Post-Settlement Advice
- Annuity Recommendations
- National Copy Service
- Workers' Compensation Legal Services
- Liability Claim Review and Allocations
- Rush Turnarounds in 24 Hours or Less
- Medicare Lien Appeals
- Medicare Mandatory Reporting Services

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*Any Questions?*

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