South Florida BUSINESS JOURNAL

AUGUST 2011

2011 GUIDE TO HEALTH CARE

MAKE YOUR HEALTH CARE DOLLARS WORK FOR YOU

How to deal with Medicare and workers' compensation

GUEST COLUMN

Gail Diamond Baker

No matter what kind of business you own, you've probably had to deal with a workers' compensation or liability claim. What you might not realize is that federal law requires consideration of Medicare's interests when settling these cases.

That means settlements must comply with Medicare requirements and overcome obstacles and delays that can threaten the settlement, delay resolution, and increase the cost to businesses. Several common misconceptions and/or problems exist about settling workers' compensation and liability claims.

Medicare is health insurance for people age 65 and over and the disabled. Medicare is the primary payer, meaning it pays medical claims before other insurance, except when another party has primary responsibility. Under federal law, Medicare is the secondary payer to group health plans, liability insurance, no-fault liability insurance and workers' compensation. The Medicare Secondary Payer (MSP) Act was enacted to ensure that Medicare is secondary and reimbursed for payments that are the primary responsibility of another entity. However, misinformation exists about Medicare requirements when settling liability and workers' compensation claims. Three separate ones should be considered by firms and their insurers.

The first involves reporting requirements. Until recently, insurers were not required to report cases to Medicare in which they were the primary insurer. This resulted in improper payments by Medicare. Due to concerns over the future of the Medicare program, Congress created a mechanism to enforce the laws and to assist with recovery efforts. A congressional act passed in 2007 requires insurers, including self-insureds, to report settlements and ongoing responsibility for medical care to Medicare. Starting in January 2011, no-fault and workers' compensation insurers began reporting to Medicare; liability insurers will begin in January 2012. Failure to report these claims can result in the assessment of fines of $1,000 per day per claim. Larger insurers are complying with these reporting requirements. However, small-business owners, including self-insureds, must be aware of the reporting requirements and take steps to comply or face steep fines.

The second issue involves allocating a portion of settlement money toward future medical treatment related to the injury or accident. The term "Medicare set-aside" (MSA) refers to an allocation report, similar to a life care plan, which recommends allocating a portion of the settlement funds for future Medicare covered medical expenses related to the injury or accident.

Once the case settles, the money is allocated from the settlement and placed in an MSA account. In workers' compensation settlements, Medicare has established a voluntary approval process as a means of protecting Medicare's interests.

The Centers for Medicare and Medicaid Services has issued 16 memorandums since 2001, creating the procedure for parties to the settlement to seek review and approval of the MSA and ensure Medicare compliance. The concern for businesses is that the Medicare approvals are often significantly higher than the proposed MSA.

The third area of concern involves reimbursement of conditional payments to Medicare. Under the MSP statute, Medicare will not pay for a medical treatment if a primary payer is responsible for it. If Medicare paid for medical treatment, then it can seek reimbursement from settlement parties.

This process of verifying conditional payments by Medicare is plagued with delays and exposes parties to recovery by Medicare and potentially double damages well after the settlement is finalized. So, businesses and insurers must start the verification process early to avoid issues that can arise at settlement and potential exposure and recovery action by Medicare once settlement is finalized.

GAIL DIAMOND BAKER is an attorney with Kelley, Kronenberg, Gilmartin, Fichtel, Wander, Barndas, Eskalyo & Dunbrack, P.A. For more information, call (954) 370-9970 or email gbaker@kelleykronenberg.com.