

Workers' Compensation and Medicare Update

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Indication of Liability Medicare Set-Asides coming in 4th Quarter.

The Centers for Medicare and Medicaid Services (CMS) recently published Matter # MM9893, an article intended for physicians, providers and suppliers who submit claims to Medicare Administrative Contractors (MAC's) for services to Medicare beneficiaries.

This article was a change request, to comply with the Government Accountability Office (GAO) report entitled "MSP Additional Steps are needed to Improve Program Effectiveness for Non Group Health Plans" (GAO-12-333). The Centers for Medicare & Medicaid Services (CMS) will establish two new set-aside processes, one called a Liability Medicare Set-Aside Arrangement (LMSA) and one called a No-Fault Medicare Set-Aside Arrangement (NFMSA).

An LMSA or NFMSA is an allocation of funds from a liability or an auto/no-fault-related settlement, judgment, award, or other payment that is used to pay for an individual's future medical and/or future prescription drug treatment expenses that would otherwise be reimbursable by Medicare. This advice from CMS addresses the policies, procedures, and system updates required to create and utilize LMSA and NFMSA Medicare Secondary Payer (MSP) records, similar to those in a Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) MSP record. The change also instructs the Medicare Part A and Part B MAC's and shared systems about when to deny payment for items or services that should be paid from an LMSA or NFMSA fund:

"Pursuant to 42 U.S.C. §1395y(b)(2) and §1862(b)(2)(A)(ii) of the Social Security Act, Medicare is precluded from making payment when payment "has been made or can reasonably be expected to be made under a workers' compensation plan, an automobile or liability insurance policy or plan (including a self-insured plan), or under no-fault insurance." Medicare does not make claims payment for future medical expenses associated with a settlement, judgment, award, or other payment because payment "has been made" for such items or services through use of LMSA or NFMSA funds. However, Liability and No-Fault MSP claims that do not have a MSA will continue to be processed under current MSP claims processing instructions."¹

The GAO report was published in April, 2012 and outlined steps needed to be taken by CMS to improve the effectiveness of the nine group health plans' (MAC's) coordination of benefits to ensure that CMS is not paying for care that should be paid by primary payers.

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This notice is just one of many indications that Liability Medicare Set-Aside guidance will be released shortly. The first of these notices came when CMS released the notice of rulemaking in May, 2012. CMS eventually withdrew the proposal, but indicated it would be revisiting the matter.

In May, 2016, CMS released an RFP soliciting an administrator for the review of MSA submissions. In this RFP, the Statement of Work (SOW) contained language about how the contractor would review “other” non-group health plan set-asides. The review of Liability Medicare Set-Asides (LMSAs), if adopted, would be broken down into two categories: a full review and a cursory review, based on settlement amounts. Full review cases would be subject to a similar review process as currently implemented for WCMSA submissions, while a cursory review would only require that all necessary documents were provided for an amount to be determined. The SOW estimated that as many as 11,000 or as few as 800 cases would require a full review, based upon industry response. Additionally, CMS estimates there would be potentially 40,000 cases that would require a cursory review.

In June, 2016, CMS placed a notice in the MSP website stating that "the Centers for Medicare and Medicaid Services is considering expanding its voluntary Medicare Set-Aside Arrangements amount review process to include the review of proposed liability insurance (including self-insurance) and no-fault insurance MSA amounts. CMS plans to work closely with the stakeholder community to identify how best to implement this potential expansion. CMS will provide future announcements of the proposal and expects to schedule town hall meetings later this year. Please continue to monitor this website for additional updates."

The Liability MSA Stakeholders met in Washington, DC to discuss the LMSA issue and submitted their position paper to CMS in November, 2016.

We now have indications that as of October 1, 2017 the MAC's will be required to address the policies, procedures, and system updates required to create and utilize an LMSA and an NFMSA MSP record, similar to a Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) MSP record and deny payment for items or services that should be paid from an LMSA or an NFMSA fund.

We still do not have guidance from CMS on the submission of LMSA's but anticipate that we will receive guidance by the start of summer. We will keep you advised as these guidelines are developed. In the interim we would recommend that all parties continue to follow their current guidelines for protecting Medicare in settlements.