Government ceases consideration of 'Zero-Medicare Set-Asides' for workers' comp settlements

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On Jan. 17, 2025, the Centers for Medicare & Medicaid Services ("CMS") published an update to the Workers Compensation Medicare Set-Aside Arrangement ("WCMSA") Reference Guide that significantly changes this practice.

Beginning July 17, 2025, CMS will no longer review MSA proposals with a zero-dollar allocation. Here's what you need to know.

What is a Zero-Dollar MSA?

When a claimant enters a workers' compensation settlement, the parties must take into account Medicare's interest when a claimant is a Medicare beneficiary or a claimant has a "reasonable expectation" of becoming a Medicare beneficiary within 30 months of the settlement.

An MSA is a financial agreement allocating a portion of a workers' compensation settlement amount towards future medical services related to the workers' compensation injury that would otherwise be covered by Medicare.

The reason for this is to ensure that Medicare is not burdened with medical charges paid at the program's expense that should be borne by an employer or carrier under the applicable workers' compensation scheme.

To adequately protect Medicare's interest, the CMS recommends that an MSA arrangement be submitted and approved when a claim involves Medicare beneficiaries or soon to be Medicare beneficiaries.

An MSA is a financial agreement allocating a portion of a workers' compensation settlement amount towards future medical services related to the workers' compensation injury that would otherwise be covered by Medicare. Only certain costs fall under the agreement: doctors' visits, prescriptions, surgeries, and other relevant medical costs related to the work injury.

While this change in policy will streamline the settlement process, it is still crucial to establish sufficient evidence supporting a zero-dollar MSA.

Some workers' compensation claims don't implicate any post-settlement medical services.

In some claims, medical causation, which is a factor in determining whether an MSA is necessary, is disputed or the responsibility for future medical treatment is contested. In those claims, parties may decide to forgo funding a traditional MSA and instead obtain a written determination that no funds should be set aside. This is commonly referred to as a "zero-dollar MSA."

The new CMS zero-dollar policy

CMS has provided a list of criteria for when a zero-dollar MSA protects Medicare's interest. Previously, this criteria list was never published in the WCMSA Reference Guide. Instead, MSA submitters knew the criteria based on their knowledge of the submission process. When submitters received the approval of the zero-dollar MSA, this protected the parties from a future denial of benefits from Medicare related to the work injury.

This new announcement of policy by CMS will allow parties to proceed with settlement without the need for CMS review if one of the following criteria is established:

- The individual's treating physician documents in medical records that to a reasonable degree of medical certainty the individual will no longer require any treatments or medications related to the settling workers' compensation injury or illness.
- The workers' compensation insurer or self-insured employer denied responsibility for benefits under the state workers' compensation law and the insurer or self-insured employer has made no payments for medical treatment or indemnity (except for investigational purposes) prior to settlement, medical and indemnity benefits are not actively being paid, and the settlement agreement does not allocate certain amounts for specific future or past medical or pharmacy services as a condition of settlement.
- A Court/Commission/Board of competent jurisdiction has determined, by a ruling on the merits, that the workers' compensation insurer or self-insured employer does not owe any additional medical or indemnity benefits, medical and indemnity benefits are not actively being paid, and the settlement agreement does not allocate certain amounts for specific future medical services.
- The workers' compensation claim was denied by the insurer/self-insured employer within the state statutory timeframe allowed to pay without prejudice (if allowed in that state) during the investigation period, benefits are not actively being paid, and the settlement agreement does not allocate certain amounts for specific future medical services.

Documentation is critical for employers and carriers

While this change in policy will streamline the settlement process, it is still crucial to establish sufficient evidence supporting a zero-dollar MSA. While obtaining CMS approval of an MSA is never statutorily required, it has afforded an important protection to employers and carriers under the Secondary Payor statute, which aims to preserve the Medicare Trust Fund by ensuring that private insurers cover medical expenses before Medicare.

When CMS approves an MSA, the settling employer and carrier are protected from a future claim that inadequate consideration was provided for future claim-related medical costs. An MSA serves as proof that Medicare's interest in a claim was sufficiently considered when allocating settlement funds. Thus, if Medicare ever refused to pay future medical expenses once settlement funds were exhausted, the parties could rely on CMS approved zero-dollar MSAs as proof that Medicare's interests were adequately protected.

In essence, an MSA helps mitigate against future exposure for medical costs to the settling parties.

Now, the parties to a workers' compensation settlement will not have the protection of CMS approval. They will be at risk of a settlement being scrutinized at a later date as to whether the settlement consideration was adequate in protecting Medicare's interest.

Even if Medicare initially pays for medical expenses, it may later seek to recover those payments from the settlement funds or CMS can obtain restitution from anyone involved in the settlement, including the worker, employer, carrier, and the attorneys for the parties.

In order to protect from potential future liability, it will be critical for employers and carriers to ensure they have properly documented evidence in the settlement documentation to support the zero-dollar MSA position and show that they have protected Medicare's interest.

If they fail to do that, it can lead to Medicare refusing to pay for future medical expenses related to the injury, potentially leaving an injured worker with out-of-pocket costs and potentially jeopardizing future Medicare eligibility.

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