



HOW THE NEW PAID ACT WILL DRAMATICALLY IMPROVE MEDICARE SECONDARY PAYER ACT COMPLIANCE

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On December 11, 2020, President Trump signed the Provide Accurate Information Directly Act (PAID Act) into law. The PAID Act will significantly impact how companies are able to handle and resolve Medicare Advantage Plan (MAP) and Prescription Drug Plan (PDP) claims in accordance with the Medicare Secondary Payer Act (MSPA). After years of frustrated attempts at compliance amidst the looming threat of class action lawsuits, the PAID Act is a very welcome and much-needed development.

THE MOVING PARTS OF MEDICARE SECONDARY PAYER COMPLIANCE

The MSPA provides that Medicare may not be called upon to pay medical expenses

for a Medicare beneficiary if another entity, known as a primary payer, exists and should pay for the same. Primary plans include workers' compensation, no-fault and liability insurers as well as self-insureds. Medicare Secondary Payer (MSP) compliance for such entities essentially fits into four categories: future medical expenses, Section 111 Reporting, Medicare conditional payment claims, and MAP and PDP claims. Each category should be considered and addressed in cases involving Medicare beneficiaries.

When settling a case with a Medicare beneficiary, arrangements for the payment for future medical expenses likely to be incurred should be discussed in settlement negotiations and explained clearly in doc-

uments. Whether through a more formal set-aside or simple designation of settlement funds for future medical payments, adequate consideration should be given to how such expenses will be paid to ensure that the burden of payment will not be shifted to Medicare.

In addition, Section 111 Mandatory Medicare Reporting rules require certain primary payers, known as Responsible Reporting Entities (RREs), to electronically report information to Medicare when a settlement, judgment, award or other payment is made to a beneficiary. This helps Medicare more easily identify entities from whom it may recover conditional payments and deny additional payment of medical expenses for which another entity is responsible.

When Medicare does make a payment on behalf of a Medicare beneficiary, such payment gives rise to a conditional payment claim. Medicare is statutorily entitled to recover amounts it has paid from the primary payer, beneficiary, provider, supplier, physician, attorney, state agency or private insurer that has received a primary payment. The MSPA gives Medicare a direct right of action to recover if repayment is not voluntarily and timely made. In addition, the MSPA allows for a private cause of action to recover payments. If a lawsuit becomes necessary, double damages may be awarded.

In addition to granting traditional Medicare a right to recover conditional payments made on behalf of a beneficiary, the MSPA extends that same right of recovery to MAPs and PDPs. Though challenged several times, courts across the country, including the Third and Eleventh Circuits, have almost always upheld the right of MAPs and PDPs to recover.

WHAT EXACTLY ARE MAPS AND PDPs?

Once an individual reaches the age of 65, he or she becomes entitled to Medicare. Additionally, after an individual has been a Social Security Disability recipient for 24 months, he or she becomes entitled to Medicare benefits. Upon Medicare entitlement, beneficiaries are able to receive traditional benefits which include Part A, hospitalization coverage, and Part B, medical treatment coverage.

Once an individual is enrolled in Medicare, he or she may opt to pay an additional premium to obtain coverage by an MAP, which is Part C and covers medical treatment expenses plus hospitalization, and/or a PDP, which is Part D and covers prescription medications. MAP and PDP benefits are provided by private insurers and oftentimes include coverage for treatment that traditional Medicare does not include. For example, many MAPs provide for fitness and dental benefits, eye exams and glasses, hearing aids, over-the-counter items and more. One study conducted by the Kaiser Family Foundation indicates that there are 3,550 MAPs available to beneficiaries in 2021, more than ever before, and the average beneficiary has access to 33 plans. In some states, more than 40 percent of beneficiaries, or 24.1 million individuals, opt for MAP and/or PDP coverage.

If a primary payer exists and a settlement, judgment, award or other payment is made to a beneficiary, MAPs and PDPs are entitled to be reimbursed for any amounts expended for medical care and treatment of that beneficiary. If reimbursement is not

made timely, the MAP or PDP may exercise its right to file a direct cause of action against the primary payer to recover. Many such claims have been successfully brought nationwide.

In addition to several direct causes of action filed by MAPs across the country, a group known as MSP Recovery has filed more than 110 lawsuits through the private cause-of-action provision contained in the MSPA. As with traditional Medicare, if an MAP or PDP must sue to recover, double damages are available. The same holds true for claims brought under the private cause of action provision. As such, filing these claims could potentially be a fairly lucrative business. To date, however, many claims filed by MSP Recovery under the private cause of action provision have been dismissed on technical or procedural grounds.

IDENTIFYING MAPS AND PDPs

Knowing that an MAP or PDP is due to be reimbursed is one thing. Determining the identity of an MAP or PDP that has paid for medical expenses on behalf of a beneficiary, however, is another. For years, primary payers have struggled with this issue and process.

Through the Section 111 query process, RREs are able to determine whether a claimant is entitled to traditional, Part A or Part B Medicare benefits. In addition to Section 111 queries, Medicare has established an electronic process through which traditional Medicare conditional payment claims may be researched, disputed, and resolved. Unfortunately, however, no process currently exists which would allow a primary payer to determine the identity of an MAP or PDP or to learn whether such plans have made primary payments on behalf of a beneficiary. In order to make those determinations, primary payers are left with the litigation discovery process or simple questioning of a claimant and his or her attorney. This method is certainly not foolproof, however, and the stakes are high.

PAID ACT REQUIREMENTS

As part of an appropriations bill aimed at preventing a government shutdown, Congress recently passed the PAID Act. President Trump signed it into law on December 11, 2020. The Act requires that, in response to a Section 111 query from an RRE, Medicare must provide information concerning whether a claimant is currently, or has been during the preceding three-year period, entitled to traditional Medicare benefits. In addition, Medicare must provide the name and address of any MAP or PDP in which the claimant is, or

has been, enrolled during that same period. This requirement will go into effect one year from the date of enactment, which will be December 11, 2021. At that time, compliance with the MSPA with regard to MAPs and PDPs will become much easier.

WHILE WE WAIT

Until the PAID Act goes into effect, workers' compensation, no-fault and liability employers, self-insureds and insurers should evaluate all of their policies with regard to the MSPA. A plan should be in place to ensure that accurate, timely Section 111 reporting is taking place and that any conditional payment claims are being researched and properly resolved. Simply including language in settlement documents providing that a claimant will be responsible for repaying Medicare claims is insufficient to protect a primary payer from liability. Medicare is not bound by an agreement to which it is not a party. Further, the MSPA is clear that Medicare is entitled to recover its payments from any party involved in a settlement, regardless of who the parties designate as being responsible. In addition to conditional payment claim issues, potential future medical treatment needs should be considered.

Once the PAID Act becomes effective, primary payers should immediately begin using the Section 111 process to determine the existence of MAPs and PDPs that may have paid related claims on behalf of a Medicare beneficiary. Once that determination is made, contact with those entities should immediately follow, along with efforts to resolve any potential claims.

The PAID Act will greatly improve primary payers' ability to comply with the law and avoid double damages, fines, penalties and legal expenses to defend both direct and private causes of action by or on behalf of an MAP or PDP. It will also give primary payers more confidence that settled claims are completely resolved and may be closed for good.



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