A Beginner's Guide to the MMSEA

If you are a practicing labor and employment lawyer that intends to settle an employment claim in the future, the time has come to learn and understand the Medicare, Medicaid and SCHIP Extension Act ("MMSEA").

In short, Section 111 of the MMSEA requires liability insurers and employers (both public and private) to electronically report to Medicare the details of settlements, judgments, awards or other payments to Medicare recipients. Due to the complexity of the MMSEA, it would be an impossible task to outline its extensive requirements in a short article. Accordingly, this article addresses two essential questions: (1) Does the MMSEA apply to employment claims; and (2) How does one comply? With regard to the first question, the answer is yes! Per written guidance issued by the Center for Medicaid and Medicaid Services ("CMS"), a claim is reportable "where the insured party is (or was) a Medicare beneficiary and medicals are claimed and/or released or the settlement, judgment, award or other payment has the effect of releasing medicals." Further, CMS has taken the position that all settlements of employment disputes which have the effect of releasing medicals (i.e., a general release) must be reported.

According to this broad definition, nearly all general releases are reportable under the MMSEA. At a minimum, the following steps should be taken by defense counsel to comply with the MMSEA:

- Advise clients to register online for electronic reporting with CMS' Coordinator of Benefits Contractor ("COBC").
- At the outset of all charges, lawsuits, and threatened legal actions, and well before settlement or judgment, determine whether the plaintiff is enrolled in Medicare and, if so, if Medicare has made conditional payments on behalf of the plaintiff.
- Before finalizing and signing a severance (or settlement) agreement and before making any payments, revisit whether the employee is enrolled in Medicare and, if so, if Medicare has made conditional payments on behalf of the employee which could be related to the release.
- Direct clients or insurers to electronically report severance payments (or settlements), judgments, awards, or other payments to Medicare beneficiaries to COBC within the applicable reporting period.
- Insert appropriate language into all settlement agreements which addresses the particular facts and circumstances of each case.
- Where cases involve Medicare beneficiaries: (a) determine if the Medicare Secondary Payer Recovery Contractor ("MSPRC") has issued conditional or final demand letters to the plaintiff for secondary payments; (b) work with opposing counsel to appeal the MSPRC's demands for any payments that are not related to the settlement or severance agreement; and (c) include a procedure in the settlement agreement for follow-up with the MSPRC.
agreement to ensure that Medicare is reimbursed for any secondary payments covered by the settlement to avoid exposure to Medicare liens. Recently, statutory amendments were passed which require CMS to issue new regulations which streamline this process.

- Where an insurance policy applies to the claim, follow all policies and procedures required by the insurance carrier with respect to Section 111 reporting and Medicare liens.

Failure to comply with the MMSEA may be an expensive mistake. Late reporting can result in a discretionary fine of $1,000 per day, per claim. Additionally, CMS, through MSPRC, can recover conditional payments from any person who receives a portion of the payment (the beneficiary and his/her attorney) or any person who is responsible for making the payment (the insurer, the insured, or self-insured entity). Because employee-plaintiffs and their counsel may be liable for conditional payments due to CMS, they also have an interest in ensuring MMSEA compliance. Finally, CMS can sue for double damages (twice the lien amount) plus interest.

Although these recommendations are an initial step in the right direction, compliance obligations may be amended when CMS issues the new regulations and as CMS continues to revise and update guidance. Therefore, it is critical to follow relevant MMSEA developments. If you handle employment practices liability insurance ("EPLI") matters, a valuable source for MMSEA-compliant language is the EPLI carrier. Given the complexity of the MMSEA and its broad reach, all employment practitioners are advised to become familiar with the requirements and how those requirements will impact employment claims in the future.

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