Reprieve for Insurers: Medicare Secondary Payer Reporting Requirements Delayed

Posted on February 23, 2010 by Marina Karvelas

The U.S. Department of Health and Human Services ("HHS") announced on February 16, 2010, that it will extend the deadline for reporting requirements under the Medicare Secondary Payer Act from **April 1, 2010 to January 1, 2011**. The news provides welcome relief for property and casualty insurers who have been working diligently to meet the new reporting requirements amidst significant uncertainties in implementation.

In addition, the HHS promised it will release during the week of February 22 the next version of its User Guide as well as provide an alert that describes the steps that reporting entities can take to assure their ongoing compliance with the new reporting requirements.

The Medicare Secondary Payer Mandatory Reporting Requirements

Over two years ago, Congress passed the Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA") 42 U.S.C., § 1395y(b)(7)(8). Section 111 of MMSEA added new and significant mandatory reporting requirements for liability insurance (including self-insurance), no-fault auto insurance and workers' compensation (collectively "NGHPs" or non group health plans) as well as group health plans ("GHPs"). Every settlement, judgment, award, or other payment from insurers to a Medicare beneficiary must be reported to the HHS through its Centers for Medicare & Medicaid Services ("CMS"). Likewise, individuals who receive ongoing reimbursement for medical care through no-fault insurance or workers' compensation must be reported to CMS.

The new MMSEA reporting requirements do not change existing rules that determine whether Medicare or another payer is the primary or secondary payer with respect to the Medicare beneficiary. The goal behind the new reporting requirements is to enable the HHS through CMS to better obtain necessary information to determine when Medicare's financial responsibility is secondary, and if so, reduce Medicare payments, or if already paid, recoup them. In this regard, Medicare may recover any conditional payments it has made that should have been paid by the primary insurance plan.

Take for example, an auto accident where the injured party is a Medicare beneficiary. If that Medicare beneficiary has available auto liability or no-fault auto insurance to cover medical expenses, payments under those policies are primary to any Medicare payments for such expenses. In fact, Medicare is always a secondary payer to liability insurance (including self-insurance), no-fault insurance, and workers' compensation.

The HHS' Stinger: Hefty Penalties

The new reporting law imposes hefty penalties for an insurer that fails to comply with the new requirements. The law allows for a civil penalty of $1,000 per day of noncompliance with respect to each individual for whom information should have been submitted.

Determining Medicare entitlement is the responsibility of the insurers, and, unfortunately, there are no standards in place for insurers to follow in making the proper entitlement determination.

So if an insurer incorrectly identifies a claimant's entitlement status and does not report, the insurer is subject to the stiff penalty.

Registration, Reporting and Data Collection

By now, insurers qualifying as "Responsible Reporting Entities" ("RREs") should have registered with CMS and are either in or preparing for file testing status.

An RRE may not limit or transfer its MMSEA reporting responsibilities, but may contract with an unrelated third party to prepare and file reports to CMS as its agent. For example, ISO has developed the ISO ClaimSearch® Medicare Secondary Payer Reporting Service to help participants comply with mandatory claim reporting requirements.

Reporting is on a quarterly basis in electronic format. A Claim Input File requires insurers to report data for over 100 different data fields. *See Appendix A – Claim Input File Layout.*

The potential for reporting errors has prompted the CMS to create a section on its website identifying "Reporting Do's and Don'ts."

While the CMS has continued the date for the first submission of NGHP input files to January 1, 2011, it also advised that NGHP file data exchange testing will continue during 2010 as needed and will be completed by December 31, 2010.

All information and official instructions for Section 111 and its implementation including data reporting procedures can be found on the CMS website. The website includes extensive information about reporting requirements, including Section 111 Computer Based Training for RREs and their agents, as well as a User Guide, transcripts of Section 111 teleconferences and upcoming teleconferences.

Upcoming teleconferences are scheduled as follows:

NGHP Technical Support Question & Answer

- March 16
- March 31

NGHP Policy Question & Answer

- February 25

The Grounds for an Extension on MMSEA Mandatory Reporting

The American Insurance Association, the National Association of Mutual Insurance Companies and the Self-Insurance Institute of America in early February 2010 sent HHS' Secretary Sebelius a letter urgently requesting that HHS delay its April 1, 2010, implementation date for Section 111 mandatory reporting requirements. In that letter, the trade groups outlined significant issues with the April 2010 implementation.

[T]he agency has yet to demonstrate that the new reporting system will properly function. Yet, we are expected to begin reporting data using this system in just a matter of weeks. Even more critical, CMS has not yet provided final reporting parameters to those insurers and self-insureds subject to the new requirements. Since failure to comply with the reporting requirements . . . will expose insurers and self-insureds to substantial financial penalties, we believe that a more realistic implementation date is not only appropriate but also imperative."

AIA News Release, "Trade Groups Ask For Delay In MSP Reporting Requirements" (2/22/2010).

The letter outlined five major concerns.

1. CMS has yet to provide final guidance as to which entity has reporting responsibility in situations involving risk-sharing arrangements where more than one RRE has a share in the settlement. AIA 2/22/2010 News Release.

2. Insurers have serious concerns with the mandatory requirement to submit private information such as a Medicare beneficiary's social security numbers and health insurance claim numbers. "In other words, reporting entities are being directed to obtain information from individuals that CMS itself advises those individuals to provide only to their physician or other Medicare provider." Moreover, for property and casualty insurers, this information is not readily available. AIA 2/22/2010 News Release.

3. "[W]e have serious concerns that CMS is not properly using the highest-level security and encryption technology to ensure the privacy of personally identifiable information that is required to be submitted. During the testing period, companies in the industry will be creating files, for the first time for CMS, containing the names and Social Security or health insurance claim numbers of thousands of individuals. As recently as last month, while in live production of a query, a reporting agent submitted one hundred files and received thousands of unrelated files in return." AIA 2/22/2010 News Release.

4. "CMS has only just begun to allow entities to test the mandatory electronic reporting capabilities and interfaces with CMS systems. This short window of opportunity for system testing has put significant stress on capabilities of internal information technology groups, reporting agents, and the CMS coordination of benefits contractor to whom covered entities must report. Predictably, this has led to delays in the testing process. Given that there are more than 24,000 entities registered to report, the time contemplated for testing the system is insufficient to guarantee a successful implementation on April 1, 2010." AIA 2/22/2010 News Release.

5. The letter aptly notes that the $1,000 per day, per claim penalty provision is excessive and at a minimum it should not be assessed on the first report submitted by any entity. For example, because CMS mandates that reporting occur once a quarter, "errors and glitches in a new reporting system cannot be addressed for 90 days. Hypothetically, failure to report a $2,500 automobile medical payment to a Medicare beneficiary could subject the reporting entity to a $90,000 fine." AIA 2/22/2010 News Release.

Helpful Links and Information

Compilation of Social Security Laws

CMS Medicare Secondary Payer Mandatory Reporting

Medicare Secondary Payer Mandatory Reporting Liability Insurance (Including Self-Insurance), No-Fault Insurance, and Workers' Compensation USER GUIDE

New information, updates and changes to the MMSEA111 web page

Liability Insurance, Self-Insurance, No-Fault Insurance and Workers' Compensation (NGHP)

DRI - Medicare Secondary Task Force