

Employers May Face Stiff Penalties for Noncompliance with Reporting Requirements of Section 111 of the Medicare & Medicaid SCHIP Extension Act of 2007

September 23, 2011

Effective January 1, 2012, employers, and other self-insured entities, will be subject to new federal reporting requirements. Section 111 of the Medicare & Medicaid SCHIP Extension Act of 2007 is intended to assist Medicare in obtaining reimbursement for health care payments. After several delays, these reporting requirements will go into effect for settlements and payments made after October 1, 2011, by insurance companies and self-insured entities as well.

The penalty for noncompliance is significant -- a civil money penalty of \$1,000 per day. Plainly, the federal government takes protecting Medicare's interests seriously -- and so must the rest of us.

By statute, Medicare is not supposed to have to pay health care costs for Medicare beneficiaries if there is another entity that is legally responsible for payment of the benefits. In insurance lingo, Medicare is a "secondary payer" and its status as such is codified in the Medicare Secondary Payer Act. If Medicare makes payments that are the primary responsibility of another entity, Medicare is entitled to reimbursement. Medicare can seek repayment from the beneficiary directly if the beneficiary has been paid by the primarily responsible entity. Medicare also has the option of seeking reimbursement from the primarily responsible entity -- even if that entity has already paid the beneficiary.

The new reporting requirement is triggered when medical expenses previously incurred by a Medicare beneficiary are either claimed or released as part of a settlement or payment of a judgment or award after October 1, 2011. The so-called "responsible reporting entity" must register with Centers for Medicare and Medicaid Services (CMS) and report the total payment obligation to the claimant/beneficiary. This allows CMS to recover payments previously made by Medicare to the beneficiary that are covered by the settlement or judgment.

Counsel will obviously be involved when the reporting obligation arises in connection with litigation. Outside of the litigation context, there are significant risks for employers and other self-insured entities that enter into separation agreements or releases with Medicare beneficiaries or individuals who are or may become beneficiaries due to age or disability. Any such agreements entered into after October 1, 2011, must be carefully drafted to ensure that

- Medicare reporting obligations are met if applicable;
- the agreement specifies which party is responsible for reimbursing Medicare;
- sufficient funds are allocated to reimburse Medicare; and
- appropriate indemnity language is included to ensure that the employer's interests are protected.

The Medicare Secondary Payer Act and Section 111 reporting requirements are complicated and leave much territory uncharted. The \$1,000/day penalty for noncompliance provides sufficient incentive to make sure that the requirements are met and Medicare's interests protected. Clients are advised against entering into release agreements after October 1 without legal review if there's any chance that Medicare has an interest in the payments.

For more information, contact your Miller Canfield Employment + Labor attorney.

Continued

Megan Norris
313.496.7594