

CMS MAKES MAJOR ANNOUNCEMENT.

Are You and Your Clients Compliant?

CMS ISSUES NEW GUIDANCE ON LIABILITY AND NO FAULT MSAs...

HERE'S
WHAT YOU
NEED
TO KNOW.

Failure to adequately protect your clients' Medicare benefits could result in major legal malpractice exposure.

Take action now to make sure you understand the new guidance and have the proper tools in place to protect your firm from unnecessary exposure.

THE
NOTICE

CMS will publish protocol on 10/1/17 including specific guidance on the creation of additional set-asides.

How Will the Medicare Administrative Contractors Know?

CMS has instructed Medicare Administrative Contractors (doctors, hospitals, etc.) to deny payment for items or services that should be paid from an LMSA or an NFMSA.

? LMSA: Liability Medicare Set-Aside
NFMSA: No-Fault Medicare Set-Aside

How Is This Different? Old Law, New Guidance.

This is based on current law*: A beneficiary cannot shift the burden to Medicare when payment has been made or can reasonably be expected to be made under workers' compensation, auto or liability insurance, or no-fault insurance.

* Under 42 U.S.C. Section s 1395y(b)(2) and 1862(b)(2)(A)(ii) of the Social Security Act

Why Does This Matter?

While there has been a process in place for Workers' Comp cases, CMS's enforcement mechanism for Liability and No-Fault cases has been unclear... UNTIL NOW.

SO HOW DO I PROTECT MYSELF AND MY CLIENTS?

Liability and No-Fault settlements will now be under greater scrutiny; knowing how to comply can be confusing until CMS issues clearer guidance. Contact Providio for a free case consultation to ensure you have the latest information and expert resources you need in order to protect your clients and your practice.

KNOW WHAT'S AVAILABLE TO YOU: Providio Offers Free Case Consultations, WCMSA & LMSA/NFMSAS, No Action Memorandums, MSA Reduction/Apportionment Legal Opinion Letters, Life Care Plan-To-MSA Conversions.

CMS Finally Announces Liability and No Fault MSAs To Commence in 2017:

Are You Ready?

This month the Centers for Medicare & Medicaid Services (“CMS”) published Matter # MM9893, dated February 3, 2017 with an effective date of October 1, 2017, relating to the implementation of Liability MSAs (“LMSA”) and No Fault MSAs (“NFMSA”).

The Notice states that in order to comply with the Government Accountability Office’s (“GAO”) final report on the Medicare Secondary Payer (“MSP”) Program to improve program effectiveness for Non-Group Health Plans, CMS will establish two (2) new set-aside processes:

- A Liability Insurance Medicare Set-Aside Arrangement (LMSA), and
- A No-Fault Insurance Medicare Set-Aside Arrangement (NFMSA).

The GAO’s report was published in 2012 and included commentary that a set aside program for both liability and no-fault recoveries was needed. An LMSA or an NFMSA is: (1) an allocation of funds from a liability or an auto/no-fault related settlement, judgment, award, or other payment (2) that is used to pay for an individual’s future medical and/or future prescription drug treatment expenses and (3) that would otherwise be reimbursable by Medicare.

CMS has stated the two new set-aside processes will address the policies, procedures, and system updates required to create and utilize an LMSA and an NFMSA MSP record. We anticipate that the new processes will be similar to a Workers’ Compensation Medicare Set-Aside Arrangement (WCMSA) MSP record, but hope they will take into account the differences between commutation in the workers’ compensation area and compromise in the no-fault and liability areas. Meanwhile, effective immediately, CMS has instructed Medicare Administrative Contractors (“MACs” – e.g., doctors, hospitals, etc.) to deny payment for items or services that should be paid from an LMSA or an NFMSA fund.

As we have previously noted, CMS has been signaling this change for some time. For example, CMS has mentioned the need for administrators to be able to handle LMSAs, as seen with the draft RFP and Statement of Work found online and publicly available for viewing at: <https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=d3b45cd4fe90079ae5eaf5b2a96b9298&cvview=0>. Parties should note the provision that the contractor will review other non-group health plan set-asides (i.e., referring to reviews of MSAs on liability cases). It is unclear at this time whether the LMSA review process will involve a full review for all set asides, whether full reviews will be applied at only certain monetary thresholds and/or whether some lesser, cursory review process may be employed.

This is just one of a series of indications from CMS that they are once again considering LMSAs. The first indication came in May 2016 when CMS released the RFP-CMS-2016-8A-0008 PRE-SOLICITATION notice, which amended the Statement of Work to include the processing of other Non-Group Health Plan Medicare Set Asides Arrangements. This was followed in June 2016 by a CMS update on its website with a notice titled: "Consideration for Expansion of Medicare Set-Aside Arrangements." The notice stated that:

"The Centers for Medicare and Medicaid Services is considering expanding its voluntary Medicare Set-Aside Arrangements amount review process to include the review of proposed liability insurance (including self-insurance) and no-fault insurance MSA amounts. CMS plans to work closely with the stakeholder community to identify how best to implement this potential expansion. CMS will provide future announcements of the proposal and expects to schedule town hall meetings later this year. Please continue to monitor this website for additional updates."

Insurers and attorneys should note that CMS does not need new law to implement LMSAs or NFMSAs. Under 42 U.S.C. Sections 1395y(b)(2) and 1862(b)(2)(A)(ii) of the Social Security Act, Medicare is precluded from making payment when payment "has been made or can reasonably be expected to be made under a workers' compensation plan, an automobile or liability insurance policy or plan (including a self-insured plan), or under no-fault insurance." MSAs have been used in workers' compensation settlements for nearly 15 years, and will soon be a regular consideration in liability and no fault settlements.

Analyst's Note: We have been discussing this marked transformation since last year and have been preparing our clients accordingly. While others may advocate using the workers' compensation methodology for a LMSA, this is both inappropriate and costly and is the legal equivalent of shoving a square peg into a round hole. LMSAs and NFMSAs should be approached in a manner that takes into account the substantial differences between workers' compensation, liability, and no fault settlement; they should be established by an administrator with extensive experience in liability and no fault cases. CMS has announced a target date of October 1st, 2017. If you would like assistance in setting up a LMSA or NFMSA compliance program or reviewing a particular case, please contact Providio and we would be pleased to assist you.

You can view the full language from CMS here: <https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/2017-Transmittals-Items/R1787OTN.html?DLPage=1&DLEntries=10&DLFilter=medicare%20set%20aside&DLSort=1&DLSortDir=ascending>