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Get the Proposed MSA *Before* Negotiating

By Autumn Capelle Hoag

I will venture to state the vast majority, if not all, people who are subscribed to Brown & Carlson's Insight Article pride themselves in trying to be prepared when commencing negotiations. This blast is to share one tip that I believe will improve the outcome on claims where a proposed Medicare Set-Aside (MSA) is needed prior to finalizing the settlement: Get the proposed MSA *before* you negotiate.

I sometimes hear that the proposed MSA does not need to be obtained until *after* a settlement is reached. The rationale is that the employer and insurer do not want to incur the cost of the proposed MSA if the matter is not going to settle. While that rationale makes sense on its face, it's important to keep in mind that most claims settle. Further, the cost of getting the proposed MSA prior to negotiations pales in comparison to what can be lost when the parties are left to guess during negotiations at how the to-be-obtained MSA could impact their settlement options.

Knowing the estimated value of the close out of future medical benefits, or the proposed MSA amount, is beneficial going into settlement negotiations for the following reasons:

- **Allows one determine whether they truly want to pursue a close out of future medical.** Whether the proposed funded MSA is for \$5,000 or \$50,000 may make a difference if it is unlikely the employee will seek any additional future medical treatment.
- **Permits one to assess what total authority is needed.** Will a \$0 MSA be proposed or will you need to plan to fund an MSA and at what amount? Having the proposed MSA allows the parties to negotiate with more information and it allows the insurer to better establish reserves.

- **Puts one in a position to offer actual dollars to the employee in negotiations for the close out of future medical.** In short, money talks and it offers assurances. Instead of offering an employee \$15,000 plus the cost of a funded MSA, you can instead offer \$15,000 and agree to fund a \$4,500 MSA. Hearing that a total of \$19,500 is being offered is likely to sound better to an employee than \$15,000 plus the cost of an unknown and this may make settlement more likely, and potentially at a better price point for the employer and insurer.
- **Allows one to assess whether the parties can stay under the \$25,000 settlement threshold for submitting the MSA to Medicare for approval.** This has helped me on countless claims to leverage a better settlement and to avoid a submission to Medicare. For example, if you know there is a proposal for a \$3,000 funded MSA, you can use this as leverage in negotiations to secure settlement of all other aspects of the case under \$22,000 to avoid necessary submission of the MSA to Medicare for approval. Without this information, you may agree to settle at \$23,500, only to then get a proposed \$3,000 MSA that needs to be submitted to Medicare and delays your ability to file the Stipulation for months. With an MSA submission, there is also the additional risk that Medicare will counter with a higher funded MSA amount, leaving you to either negotiate with Medicare or agree to the higher MSA amount.
- **Helps the parties avoid the dreaded settlement backout.** If the employer and insurer do not have a proposed MSA at the time of negotiations, the parties will likely be forced to settle the claim contingent on obtaining an agreeable MSA post-settlement. If an unexpected MSA is obtained, this could put the settlement at risk of failing and/or needing to be renegotiated.

Knowing when and how to use proposed MSA is critical to getting the best deal you can. Please reach out with any questions you have about when and why to obtain an MSA.

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