Employee Benefits & Workers' Comp News

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COVID-19 Workers Comp Update

Businesses and governments are trying to determine when COVID-19 infections qualify for workers' comp benefits.

Some states such as California, Wisconsin and New Jersey have taken steps to provide workers compensation benefits for workers infected with COVID-19 by making it a rebuttable presumption that the infection occurred at work. In Wisconsin and several other states, the rebuttable presumption applies only to health care and emergency response workers.

Other states, such as California, have issued or-

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Taking the Surprise Out of Surprise Billing

Few people like surprise medical bills. That's why there's an active movement to protect consumers from the financial burdens created by surprise medical bills while addressing the concerns of providers and insurers.

A surprise medical bill occurs when someone who has insurance inadvertently receives care from an out-of-network provider and is charged a higher than expected rate.

Here are the three primary pieces of legislation being considered:

- **The Consumer Protections Against Surprise Medical Bills Act of 2020 (HR 5826) passed**

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ders covering all "essential" employees. In California, "essential" means "Essential Critical Infrastructure Workers," which includes workers in grocery stores, banks, transportation services, utility and communications industries, and many more people.

Businesses and many legislators have resisted these efforts and in Illinois, for example, the state workers compensation agency got a judge to agree to invalidate a legislative rule that would have presumed all COVID-19 cases involving essential workers to be work-related.

OSHA Logs

Without an actual workplace outbreak of COVID-19 (such as has occurred in several meat packing plants), it would be difficult in most cases to determine how a worker may have contracted the virus. The exception is first responders and health care workers who deal directly with COVID-19 patients. In the case of these essential workers, however, OSHA guidance actually requires employers to log COVID-19 illnesses on their OSHA 300 Logs. Not so with other worker classifications.

Employees Suing Employers

While workers compensation is a "no-fault" system, exceptions exist, such as when the employer intentionally or negligently causes harm to the employee. This is what's such a great concern for many businesses that want to open back up sooner than later. Employees could allege wrongful death or illness due to COVID-19 arising out of the employer's intentional misconduct. (See our article in this edition "Employers Liability and COVID-19.")

Senate Attempts to Limit COVID-19 Liability

These concerns and lawsuits from the general public are why business groups such as the U.S. Chamber of Commerce and legislators like Senate Majority Leader Mitch McConnell have been trying to get blanket immunity for businesses to protect them from COVID-19 lawsuits.

McConnell has stated that the Senate will not pass any new stimulus legislation to help the economy unless Congress passes liability restrictions to protect businesses from being sued over allegations that it aided in transmitting the virus.

Some Senate Republicans, however, such as Lindsay Graham, a South Carolina Republican, have indicated support for putting in place certain workplace standards, giving workers recourse but providing employers a defense. The aim is to facilitate the reopening of the locked down U.S. economy without creating a "litigation heaven" for attorneys, as Trumped has warned.

Witnesses at a recent Senate hearing, representing both labor and businesses, made the proposal to create a set of guidelines for businesses to reopen, suggesting the rules could come through the Occupational Safety and Health Administration. When the Centers from Disease Control tried to issue reopening guidelines for daycare centers, restaurants, theatres and other businesses, however, the administration blocked the move, saying they were overly specific.

"It seems to me that one primary goal out of this hearing is to get the standards in place for business," said Graham. "The big hole in the puzzle right now is the standards."

"Just Another Ploy"

Democrats characterize these attempts to limit liability for COVID-19 losses as just "another ploy to strip workers of their protections — at a time when they and the public already face grave danger."

out of the Ways and Means Committee and awaits floor action in the House.

- **The Ban Surprise Billing Act (HR 5800) passed out of the Education and Labor Committee and awaits floor action in the House.**
- **A compromise was reached on two bills — S. 1895, approved by the Senate Committee on Health, Education, Labor, and Pensions, and H.R. 2328, approved by the House Energy Committee.**

While the proposals are very similar to each other, the biggest differences are how payments to out-of-network providers are determined and whether to include ambulance services.

In addition, 28 states have already enacted consumer protections to address surprise medical bills, though the state laws cannot help people covered by their employer's self-funded plans or people who receive surprise bills because of air ambulance services.

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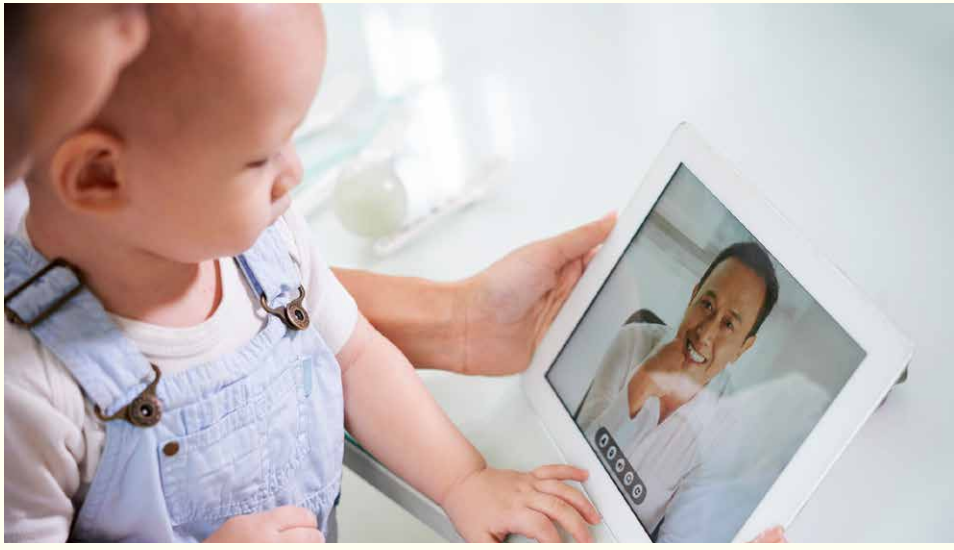
"Before this pandemic, businesses had to act responsibly and follow federal safety guidelines," said Senator Dianne Feinstein of California. "It's hard to see why they shouldn't have to do the same in the face of a deadly virus."

Many tort law scholars contend that since it would be hard to establish just when the virus was contracted, given it has a 14-day latency before symptoms appear, proving how the infection occurred would be difficult. Unless in the case of health care workers or first responders — or an allegation of an employer's intentional disregard.

Benefits and Challenges of Telehealth Begin to Emerge

Telehealth's convenience and value were highlighted when fears about the coronavirus pandemic prompted individuals to look for a way to get medical advice without having to go to a doctor's office.



Telehealth is the practice of using computers, tablets and smartphones to provide health care and services at a distance. Telemedicine refers specifically to the practice of using technology to deliver care from one location to a patient at a distant site.

More and more group insurance plans feature telehealth services as part of their benefits. One reason is that a telehealth visit is less expensive for a plan than a visit to a provider's office. For instance, a study published in *JAMA Dermatology* showed that on average a telehealth visit costs about $79, compared with about $146 for an office visit.

Government Support

The federal government has recently jumped on the telemedicine bandwagon. The Trump administration announced a major expansion of telehealth options, including allowing Americans enrolled in Medicare to talk to a doctor by phone or video chat for no additional cost.

In addition, when the COVID-19 outbreak threatened to stress hospital capacities, the House of Representatives included in its $8.3 billion emergency response bill a provision to assist efforts to contain the virus by temporarily lifting restrictions on Medicare telehealth coverage. The bill waives and modifies certain requirements for telehealth services during the pandemic, allowing Medicare to offer telemedicine beyond just rural areas.

At the beginning of the coronavirus and COVID-19

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pandemic, certain states, such as Massachusetts and Florida, have expanded telehealth coverage to make it easier for doctors and patients to connect online and to ensure that physicians get paid. Some states, like Washington, are acting to permit doctors to treat patients even if they're not licensed in the state as long as they can legally practice in another state.

Benefits

Telehealth gives patients around the clock access to care and enables providers to treat more patients than in office settings. Telehealth providers can ask questions, prescribe medications or if needed refer patients to get treatment at a doctor's office, urgent care or emergency room.

The most obvious benefit of talking to a doctor online or by phone, especially during the pandemic, is that the visit can take place without exposing the patient, the doctor or others in the office or waiting room to any kind of contagion. Not only could others be put at risk, but in the case of health care workers during the pandemic, they could be put out of commission for 14 days of quarantine.

Also, keeping patients who have contracted the virus or any disease at home allows health care workers to provide care at a distance, reserving hospitals for higher need patients.

Future Hurdles

Regulations vary from state to state and there is a lack of clarity about what is allowed, often making it difficult for physicians to get accredited to use telehealth solutions across state borders.

While some states have loosened accreditation requirements, necessitated by the spike in demand for health care during coronavirus pandemic, many telehealth providers are having a hard time keeping up with demand.

There's also a concern that physical exams provided by phone or computer are not as accurate as those that are done in person.

Issues also exist about personal medical data security and its potential to be used for data mining or to create targeted advertising.

Before telehealth can become a truly valuable resource these issues will need to be addressed. ■

States Taking Action to Control Rising Drug Costs

States are taking action to keep prescription drug costs from rising uncontrolled.

Some prescription drug costs have risen so high that patients are being forced to choose between buying prescriptions or buying groceries. As a result, several states are leading the charge to reform the prescription drug industry price structure.

How Prescription Drugs are Priced

KFF (Kaiser Family Foundation) reports that out-of-pocket drug spending for those in large employer plans and Medicare Part D is highest for drugs to treat cancer, multiple sclerosis and rheumatoid arthritis. Why these costs are so high and what can be done about them is yet to be determined.

The American Medical Association, which is running a TruthinRX campaign, asserts that there are three major market players who they believe significantly impact drug prices:

- **Pharmaceutical companies** make and sell drugs, don't explain pricing or why they often greatly exceed research-and-development (R&D) expenses. Some companies buy existing drugs, spend nothing on R&D and still raise prices.
- **Pharmacy benefit managers (PBMs)** work on behalf of health insurance companies or employers and negotiate upfront discounts or rebates on the prices of prescription drugs. The *FierceHealthcare* publication asserts that many PBMs keep the negotiated cost savings for themselves and some even charge higher drug prices to their customers and keep the difference.
- **Health insurance companies** approve treatments, set co-pays, and

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set prices with PBMs, often with an eye on what will maximize company profits.

Current Laws

Congress is debating more than a dozen bills targeting drug costs, but there are concerns that political divisiveness, a packed congressional schedule and a looming election year — not to mention the impact of the pandemic — could stall the passage of any of these bills.

And, while there has been some federal legislation, states are pushing for more regulation. Kaiser Health News reported that 33 states enacted 51 laws in 2019 to address drug prices, affordability and access. The measures focus on:

Price Transparency

The majority of states have enacted laws requiring drug companies to provide information to states and consumers on the list prices of drugs and planned price increases. Most drug companies have complied and post the data on their websites. Oregon's new law goes further and requires manufacturers to notify the state 60 days in advance of any planned increase of 10 percent or more in the price of brand-name drugs or price increases of 25 percent or more in the price of generic drugs.

Gag Rules

Some pharmacy benefit managers (PBMs) include "gag clauses" in their pharmacy contracts. Gag clauses stop pharmacists from discussing whether a drug's cash price would be lower than the customer's out-of-pocket

cost under insurance. Several states in 2019 and 2018 enacted laws that ban the practice. Congress in October 2019 passed a federal law banning the clauses in PBM-pharmacy contracts nationwide and under the Medicare Part D prescription drug benefit. Despite that, many of the state PBM laws contain additional gag clause limitations that go beyond the 2018 federal law.

Importing Drugs

Countries like Canada have lower drug costs because they negotiate directly with drug makers to set prices. Colorado, Florida, Maine and Vermont have enacted measures to establish programs to import cheaper prescription drugs from Canada and, in Florida's case, from other countries as well. A 2003 federal law already allows states to import cheaper drugs from Canada, but only if the federal Health and Human Services Department approves a state's plan and certifies its safety. Despite this, the federal government halted drug import efforts in five states between 2004 and 2009.

One big problem to the states' plan is that the Canadian government has opposed any plan that relies solely on Canada as a source of imported drugs.

Drug Affordability Boards

Maryland and Maine have established state agencies to review the costs of drugs and to take action against those whose price increases exceed a specified amount. For instance, state agencies would review drugs that increase $3,000 or more per year; they would also review new medicines that enter the market costing $30,000 or more per year for a drug regime. In addition, starting in 2021, Maine will have a five-member board to set annual spending targets for drugs purchased by state and local governments. ■

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What's More Important? Reducing Frequency or Severity?

Workers' compensation losses are measured by their frequency and severity. Which is the most important to focus on if you want to reduce workers compensation costs?

It may appear that the severity of a large shock loss will impact your costs more than several smaller losses. However, when experience modification factors are calculated, the frequency of smaller claims can have as much influence, if not more, than large losses or a shock loss.

The bottom line? Focus on both. Reduce frequency and control severity. It's all about loss prevention. Claims will occur, though. When they do, you can take steps to control their severity.

Medical Costs

Good communication is key to controlling medical costs.

- Make sure managers know that prompt reporting of all injuries and accidents is mandatory. Research consistently shows that delayed reporting increases medical costs.
- Have a plan for regular communications with the injured worker and your insurance company. Make sure your employee is getting the appropriate care.
- When you talk to your injured employee, make sure you convey your concern for her health. Make her feel like a valued member of the team so she wants to get back to work, rather than malingering.

Early Return to Work

Getting employees back to work reduces indemnity payments and can also have a positive impact on the employee's overall recovery by improving her morale and self-worth. It also improves the morale of co-workers. Return-to-work programs need structure, including:

- Job descriptions and analyses.
- Return-to-work agreements that state the responsibilities of the employer and the injured worker
- Light duty assignments — tasks that are modifications of the usual job.
- Work schedules — full time or part time.

If you would like more information on how to control post-injury costs, give us a call.