Edging up

Short takes on emerging industry issues – ERISA updates, pregnancy discrimination developments, the Zika virus, and the benefits of integrating claims and managed care services

Proposed changes to ERISA disability claim procedures regulation: Preview and prepare

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On November 18, 2015, the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor (DOL) published proposed amendments to the claim procedures regulation for plans providing disability benefits under the Employee Retirement Income Security Act of 1974 (ERISA). The intent of the proposed changes is to align the ERISA regulations with procedural protections that apply to group health plans governed by the Affordable Care Act. The proposed rule is posted online in the Federal Register.

Written comments on the proposed changes were due on January 19, 2016. The DOL published 143 comment letters, which reflect various stakeholder viewpoints. The DOL will review the comments and issue a Final Rule. The new regulations will become effective 60 days after the date of publication of the Final Rule in the Federal Register.

The proposed changes are organized in six categories:

1. Independence and Impartiality – Avoiding Conflicts of Interest
2. Improvements to Basic Disclosure Requirements
3. Right to Review and Respond to New Information Before Final Decision
4. Deemed Exhaustion of Claims and Appeals Processes
5. Coverage Rescissions – Adverse Benefit Determination
6. Culturally & Linguistically Appropriate Notices

If published as written, some of these anticipated changes will have a significant impact on plan sponsors and administrators. A Sedgwick committee thoroughly reviewed the proposed changes and submitted detailed comments that explain concerns with the changes in three of the abovementioned categories. The summary below outlines three of the most significant challenges anticipated with the proposed changes as they are currently written.

IMPROVEMENTS TO BASIC DISCLOSURE REQUIREMENTS

If the plan did not follow views of a treating healthcare provider or other payers of benefits, such as the Social Security Administration, then the adverse benefit communication would need to contain an explanation describing why the plan disagrees with those viewpoints.

Photo credit: CDC

This proposed change is problematic because it would require an administrator to provide an analysis of information that it might not have in its possession and/or may not fully understand. The rationale behind an approval decision is unlikely to be available for a rebuttal (just the conclusion of approval). It is not reasonable to expect one plan administrator to have the expertise, information, interpretations, and other criteria to compare, contrast and analyze benefit approvals. Sedgwick's recommendation is to include an explanation of why the plan did not agree with the opinion of the treating healthcare professional but not reasons for disagreeing with other payers of benefits.

RIGHT TO REVIEW AND RESPOND TO NEW INFORMATION BEFORE FINAL DECISION

The proposed amendment requires a plan to provide a claimant with an opportunity to review any new information obtained during the review of the claim before an adverse benefit determination is made.

At first glance, the proposed new language does not seem problematic, but after reviewing it in detail, one can easily see that the proposed requirements may result in an endless exchange of information with no time limitations. It is unlikely that this back and forth review of commentary would result in the production of new information. There is no advantage to the claimant for the treating provider and the plan to continuously restate their differing opinions instead of the plan deciding if the claimant's condition meets the plan's definition of disability. Furthermore, timely decision-making is part of a reasonable claims process, and the proposed language will potentially require plans to repeatedly extend the decision-making period.

DEEMED EXHAUSTION OF CLAIMS AND APPEALS PROCESSES

Proposed new language is added that indicates a plan's failure to strictly adhere to process requirements will result in a deemed exhaustion of the administrative remedies unless the procedural violation is *de minimis*.

By adding the term "strict" to this section, even minor and inconsequential errors will create an assumption that claim procedures are unreasonable. This language encourages claimants to seek remedies in court for insignificant missteps in case management that have had no impact on claim outcomes. It is likely that these modifications would result in a significant increase in "deemed exhaustion" litigation and would needlessly burden the courts and increase the costs associated with plan administration.

In addition to these challenges, other sections of the proposed amendments should be evaluated for an analysis of the potential requirements resulting from the changes. While plan administrators will have 60 days to prepare after the Final Rule is published, it is not too early to start planning now.

RESOURCES

Federal Register. Proposed Rule by the EBSA. Claims Procedure for Plans Providing Disability Benefits. November 18, 2015. https://www.federalregister.gov/articles/2015/11/18/2015-29295/claims-procedure-for-plans-providing-disability-benefits

DOL. Claims Procedure for Plans Providing Disability Benefits – Proposed Rule. Public Comments. http://www.dol.gov/ebsa/regs/cmt-1210-AB39.html

Comments submitted by Sedgwick. January 19, 2016. http://www.dol.gov/ebsa/pdf/1210-AB39-00122.pdf

Sedgwick disability and absence management compliance webinar: Review and prepare - Proposed amendments to the ERISA claim procedures regulation. March 15, 2016. https://youtu.be/ubyTeXKiLCw

In the spotlight: Pregnancy-related discrimination and accommodations

BY **SHARON ANDRUS**

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Since 1978, the Pregnancy Discrimination Act (PDA) has made discrimination against women for pregnancy, childbirth or related medical conditions a form of unlawful sex discrimination under Title VII of the Civil Rights Act of 1964. Recently, however, this nearly 40-year-old law has been in the spotlight due to the U.S. Supreme Court's decision in *Young v. United Parcel Service*. While issues brought to the nation's highest court always garner significant attention, the issues debated in the *Young* case became somewhat more controversial when the U.S. Equal Employment Opportunity Commission (EEOC) issued interpretive guidance shortly after the Supreme Court agreed to hear the case, but before the Court had rendered any opinions.

The PDA applies to employers with 15 or more employees and requires them to treat pregnant women the same as other employees who are "similar in their ability or inability to work." The PDA also protects pregnant applicants, making it unlawful to refuse to hire a pregnant woman because of her pregnancy (as long as she can perform the main responsibilities of the position). Keep in mind that pregnancy is not considered a disability under the Americans with Disabilities Act (ADA), but complications or impairments related to a pregnancy may result in a disability protected under this law.

The general legal interpretation of the PDA, until recently, was that pregnant employees were to be treated like any other employee who had a non work-related injury or illness. This resulted in many employers taking a "pregnancy blind" approach to accommodations, granting or denying accommodations without regard to a woman's pregnancy. Employers using this approach reasoned that it would be impossible to discriminate against a pregnant woman if her pregnancy never was considered. This approach has now changed significantly.

Prior to the Supreme Court's decision in *Young*, in order to set forth a claim of pregnancy discrimination, a pregnant employee needed to show that: 1) she belonged to a protected class (is pregnant); 2) she sought an accommodation; 3) her employer did not accommodate her; and 4) her employer accommodated others who were "similar in their ability or inability to work." If the pregnant employee showed that these criteria were met, the employer then needed to state a "legitimate, non-discriminatory" rationale for not providing an accommodation. For a pregnant employee to prevail, she then had to show that the employer's justification was a mere pretext designed to mask acts of unlawful discrimination.

On March 25, 2015, the U.S. Supreme Court issued its opinion in *Young v. United Parcel Service*.[1] The Court's ruling impacted the employer's ability to stand behind a "legitimate, non-discriminatory" rationale for not providing an accommodation. In *Young*, United Parcel Service (UPS) argued that it employed a "pregnancy-blind" policy for accommodating employees' light duty requests. UPS argued that, because pregnancy never was considered, its policy could never be a pretext for unlawful discrimination.

The Supreme Court disagreed and ruled that, where an employer's policies impose a "significant burden" on pregnant workers, in the absence of an employer's "sufficiently strong" reason to justify the creation of that burden, an accommodation policy that does not take a woman's pregnancy into account may amount to a form of pregnancy discrimination. Accordingly, policies that provide light duty or similar accommodations to employees, but not to pregnant women, likely will be deemed to create a significant burden on pregnant employees. The *Young* case was remanded to the Fourth Circuit to proceed based on the Supreme Court's opinion and in October 2015, the parties reached a confidential settlement agreement.

Following the *Young* ruling, the EEOC revised the Enforcement Guidance on Pregnancy Discrimination and Related Issues in June 2015 to make them consistent with this opinion. Recently, the PDA has become a focal point of the EEOC's enforcement efforts. This increased focus is likely the result of the EEOC's disagreement with several appellate court decisions, which held that it is not unlawful to deny light duty assignments to pregnant employees if the pregnant employees are treated the same as employees with limitations that did not result from workplace injuries. The EEOC has stated that employers should not focus on the source of an employee's limitations; rather the focus should be on an employee's ability or inability to work. The recent increase in charges against employers and revisions to the EEOC's guidance reflects the EEOC's attempts

to change employers' practices based on this interpretation of the PDA.

In addition to complying with the federal requirements under the PDA, sixteen states, the District of Columbia and four cities also have enacted laws that mandate accommodations similar to those required under the ADA.[2]

A significant challenge for employers is the requirement that pregnancy-related employment laws must be followed by all levels of management. While human resources professionals and legal counsel are usually familiar with the various legal requirements surrounding pregnancy-related leaves of absence and accommodations, not all leaders are aware of their obligations. Front-line supervisors who draw their own conclusions and take unilateral action regarding which duties a pregnant employee can or cannot perform frequently cause significant legal exposure. While liability is almost always measured by the amounts paid to settle a case, this exposure also may negatively impact a company's brand and reputation.

Employers should establish policies and procedures that include regular manager training to assist with proper identification of potential pregnancy-related accommodation issues. These policies and procedures should be regularly reviewed and revised so that they always will reflect recent changes in legal standards. All managers and supervisors should understand that pregnancy-related requests for accommodations should be evaluated on a case-by-case basis, similar to the interactive process for disability claims under the ADA. Leaders need to be trained and equipped to identify pregnancy-related employment issues and to escalate pregnancy accommodation decisions to their legal and human resource professionals before taking action.

REFERENCES

[1] ***Peggy Young vs. United Parcel Service, Inc.*** **Supreme Court of the United States. Opinion of the Court. March 25, 2015.** http://www.supremecourt.gov/opinions/14pdf/12-1226_k5fl.pdf

[2] **Reasonable Accommodations for Pregnant Workers: State and Local Laws. National Partnership for Women & Families. Fact Sheet. December 2015.** http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf

RESOURCES

State-Level Protections Against Pregnancy Discrimination. U.S. Department of Labor. Women's Bureau. http://www.dol.gov/wb/maps/

Pregnancy discrimination. U.S. Equal Employment Opportunity Commission website. http://www.eeoc.gov/laws/types/pregnancy.cfm

Enforcement Guidance on Pregnancy Discrimination and Related Issues. EEOC. June 2015. http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

One team with a shared mission: Advocacy for the injured employee

BY **JIM HARVEY**

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Having a multi-disciplinary team following a shared mission of advocacy for the injured employee ensures better care management from the first call to report an injury to the moment the examiner closes the claim. Based on a recent study at Sedgwick, connecting services such as provider benchmarking and search tools, panel card production, provider validation, claims management, pharmacy programs, case management and bill review on the same technology platforms improves outcomes and controls costs.

We evaluated the results customers are seeing after placing their claims and managed care services under one roof. Our team reviewed the results achieved by six customers that moved from fully unbundled programs to integrated programs for claims management and managed care. New workers' compensation claims data was pulled for each program 12 months before integration and 12 months after integration. This study focused on indemnity and medical-only claim types. Of the six customers evaluated, four saw improvements while two followed inflation and industry trends. The customers with improvements saw an average reduction of 8.8% with one customer as high as 19.8%. The reductions were mostly from medical and indemnity; occasionally they came from expenses as well. This study showed that there is a significant benefit to combining workers' compensation and managed care services. On average, employers that participate in our integrated services model are seeing a 5% reduction in their medical and indemnity claim costs in the first year.

Some customers use select managed care solutions while others incorporate our full suite of services, which includes clinical consultation; medical bill review; telephonic, strategic and field case management; behavioral health; return to work; complex pharmacy management; utilization review; as well as a range of review and support solutions such as provider benchmarking, and access to medical and specialty networks. The integration of data across these services offers several advantages and can be used to identify trends and create strategies to improve outcomes.

Here is an example of an integrated program in action:

Beginning with a 24/7 nurse line, the injured employee is triaged and the right level of care is determined. Symptoms are reviewed during the initial call, and the nurse can determine if the employee needs treatment by a third party or if the employee can self-treat. If third-party care is needed, the nurse will send the employee to an urgent care facility or occupational medicine clinic within a preferred provider organization network. This step takes treatment decisions, with the related stress and uncertainty, out of the supervisor's hands. The nurse will send medical information to the provider such as where to send the employee for medication, imaging or therapy, if needed. This is pivotal for the continuity of care as the claim progresses. In an effective claims and managed care program operating under one roof, triage nurses, claims examiners and nurse case managers access the same provider search technology and can see provider scores based on treatment and return to work outcomes. Identifying the best doctors and having consistent resources for matching injured employees with those doctors is key to achieving better outcomes. This identification process includes provider benchmarking and search technology, a routine method for provider information validation, and reliable practices for the production, renewal and distribution of panel cards.

Throughout the entire treatment process, the claims examiner has total visibility and can take steps as needed to help move the claim forward such as suggesting peer-to-peer consultations, requesting nurse case management or recommending behavioral health services. Triggers can also be set up in the claims management system for services such as utilization review and field case management. Pharmacy programs with injury-specific and acute to chronic formularies ensure that any drugs inappropriate for the injury type and the age of the claim are identified at the point of sale. The clinical team is notified of any inappropriate prescriptions and will call the provider or pharmacist to discuss alternatives. In addition, meaningful data mining can be readily deployed when bill review, claims management and case management technology are developed and continuously enhanced with a common purpose regarding how, where and when data will be captured in the course of day-to-day business.

The primary elements that make a program successful and help drive positive results include shared missions, accountability, and the managed care and claims teams working together and accessing data through the same systems. By understanding the individual needs of each injured employee and focusing on providing the best medical care, our industry can improve outcomes and help them return to work sooner.

Zika virus: The threat and potential risk

BY **TERESA BARTLETT, M.D.**
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Employers may be considering the risk posed by the recent spread of the Zika virus and potential claims filed by employees who contract the disease. The Zika virus is transmitted to people primarily through the bite of an infected Aedes aegypti species mosquito. These are the same mosquitos that spread dengue and chikungunya viruses. Mosquitos become infected when they feed on a person already infected with the virus. Infected mosquitos spread the virus to other people through bites. The virus can also be spread through blood transfusion or sexually transmitted.

WHERE IS ZIKA SPREADING?

Prior to 2015, Zika virus outbreaks occurred in areas of Africa, Southeast Asia and the Pacific Islands. In May 2015, the Pan American Health Organization issued an alert regarding the first confirmed Zika virus infections in Brazil. Locally transmitted cases were also reported in the Commonwealth of Puerto Rico. As of March 16, 2016, no mosquito-transmitted Zika cases had been reported in the continental United States, but cases have been reported in returning travelers. Outbreaks are occurring in many countries and the virus will continue to spread, but it is difficult to determine how and where. However, researchers who tracked dengue fever outbreaks in the past predict small local outbreaks of the Zika virus in Florida and Texas.

WHAT ARE THE SYMPTOMS?

About one in five people infected with the Zika virus become ill. Symptoms include fever, rash, joint pain, conjunctivitis (red eyes), muscle pain and headache. The exact incubation period (the time from exposure to symptoms) is not known, but is likely to be a few days to a week. The illness is usually mild with symptoms lasting for several days to a week. The Zika virus usually remains in the blood of an infected person for a few days, but it can be found longer in some people. Severe disease requiring hospitalization is uncommon. Deaths are rare. Cases are identified by the symptoms, confirmation of recent travel to locales with confirmed infections and blood test results.

HOW IS ZIKA TREATED?

No vaccine or medications are available to prevent or treat Zika infections. An infected individual showing symptoms should get plenty of rest, drink fluids to prevent dehydration and take medicine such as acetaminophen to relieve fever and pain. Aspirin and other non-steroidal anti-inflammatory drugs (NSAIDS), like ibuprofen and naproxen, should not be taken until dengue can be ruled out to reduce the risk of hemorrhage (bleeding). An individual taking medicine for another medical condition should consult his or her healthcare provider before taking additional medication.

WHAT SPECIAL PRECAUTIONS SHOULD BE TAKEN BY PREGNANT WOMEN?

A mother already infected with the Zika virus near the time of delivery can pass the virus to her newborn around the time of birth, but it is rare. It is possible that the virus could be passed from mother to fetus during pregnancy. This mode of transmission is being investigated and is not yet understood. To date, there are no reports of infants getting the Zika virus through breastfeeding. The Centers for Disease Control and Prevention (CDC) recommends that women who are pregnant or trying to become pregnant use special precautions including avoiding travel to impacted areas and using protective clothing and insect

repellant. Women who are trying to become pregnant or thinking about becoming pregnant should consult with their healthcare provider before traveling to these areas and strictly follow steps to prevent mosquito bites during the trip.

There have been reports in Brazil of microcephaly and other poor pregnancy outcomes in babies of mothers who were infected with the Zika virus while pregnant. Microcephaly is a medical condition in which the circumference of the head is smaller than normal because the brain has not developed properly or has stopped growing. Additional studies are planned to learn more about the risks of Zika virus infection during pregnancy.

WHAT SHOULD EMPLOYERS DO?

Businesses with employees traveling to areas of infection should follow the precautions outlined by the CDC, including preventative measures to avoid mosquito bites. If a workers' compensation claim is filed for Zika virus exposure, it should be handled the same as any disease or exposure claim would be handled. A thorough investigation of the claim and circumstances involved should be conducted, and medical tests and evaluations should be done to confirm a diagnosis. Compensability determination would follow applicable regulatory standards for determining whether or not exposure occurred within the course and scope of employment.

RESOURCE

Centers for Disease Control and Prevention
http://www.cdc.gov/zika/