Edging up

Short takes on emerging industry issues – government compliance updates, state legislation and drug law changes

ERISA changes being introduced

BY **BRYON BASS**

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Several changes in the regulations governing claims and appeals under the Employee Retirement Income Security Act of 1974 (ERISA) became effective in January 2017 with the final phase effective January 2018. On December 19, 2016, the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor (DOL) published final regulations governing the ERISA claims and appeals process, which required changes to ERISA plan documents, Summary Plan Descriptions (SPDs) and/or policies in two phases.

The first phase, effective for claims filed between January 18, 2017 and December 31, 2017, required a limited set of expanded disclosures to be included with adverse benefit decisions. To comply with this requirement, Sedgwick updated the notices for our clients' employees with claims to inform them of their right to receive a copy of internal guidelines, and to inform them of their right to receive an explanation of how the underlying scientific or clinical judgment applies to their situation.

The second phase, effective for disability claims filed on or after January 1, 2018, includes areas for improvement related to the claims and appeals process. Below is a brief overview of each area.

- **Improvement to basic disclosure requirements** – Benefit denial notices must contain a more complete discussion of why the plan denied a claim and the standards used in making the decision. Sedgwick will update adverse benefit determination

training and ensure our disability specialists have the necessary information to assist customers and their employees. We also will include contractual obligations and the date to appeal the decision in adverse benefit determination letters. Employers should ensure their plans include contractual obligations and the timeframe to appeal decisions.

- **Right to claim file and internal protocols** – Benefit denial notices must include a statement that the employee is entitled to receive, upon request, a copy of the entire claim file and other relevant notices. Currently, this statement is only required in notices denying the benefit on appeal. Benefit denial notices also must include the internal rules, guidelines, protocols, standards or other similar criteria that were used in denying a claim, or a statement noting that none were used. Currently, benefit denial notices have the option of including a statement that such rules and protocols were used in denying the claim. Upon request from the employee, we will provide a copy of the claim file and other relevant notices, inclusive of rules, guidelines, protocols or standards used in the decision making process. Our team also will ensure that all correspondence includes a notice to the employee that they are entitled to a copy of the claim file and outline the process for requesting it. We recommend that clients ensure their SPDs and/or policies include a statement noting that the employee is entitled to a copy of their claim file and to request it from Sedgwick.

- **Right to review and respond to new information before final decision** – This prohibits plans from denying benefits on appeal based on new or additional evidence or rationales that were not included when the benefit was denied at the claims stage, unless the employee is given notice and a fair opportunity to respond. Sedgwick includes a new sub-process during appeal, referred to as the "comment period," allowing the employee an opportunity to review and respond to any new information. Our best practice allows 21 days for response from the employee before we render a final decision. We recommend employers review their current plan, SPD and/or policy language regarding the appeals process and determine if the comment period should be included.

- **Avoiding conflicts of interest** – Plans must ensure that disability benefit claims and appeals are adjudicated in a manner designed to ensure the independence and impartiality of the persons involved in making the decision. Sedgwick is compliant with this requirement.

First phase – Effective for claims filed between ***January 18, 2017*** *and* ***December 31, 2017***

Second phase – Effective for claims filed on or after ***January 1, 2018***

- **Deemed exhaustion of claims and appeal processes** – If plans do not adhere to all claims processing rules, the employee is deemed to have exhausted the administrative remedies available under the plan, unless the violation was the result of a minor error and other specified conditions are met. The plan must treat a claim as re-filed on appeal upon the plan's receipt of a court's decision rejecting the employee's request for review. Sedgwick is revising training to outline "de minimus" errors and explain in plain language what the remedy for the error is in relation to the claim decision. We also will ensure adverse benefit determination letters include contractual obligations and the date to appeal decisions. We recommend clients ensure their plan includes contractual obligations and the timeframe to appeal decisions.

- **Certain coverage rescissions are adverse benefit determinations subject to the claims procedure protections** – Rescissions of coverage must be treated as adverse benefit determinations, thereby triggering the plan's appeal procedures. Non-payment of premium rescissions is not covered by this provision. Rescissions of coverage are rarely an issue with self-insured plans. To the extent rescissions of coverage may apply in an adverse benefit determination, Sedgwick will follow the language of the plan and ensure appeal rights are explained. The Sedgwick team recommends employers ensure their plans include language regarding the right to appeal certain coverage rescissions.

- **Notices written in a culturally and linguistically appropriate manner** – This requirement adopts the Affordable Care Act's standard for group health benefit notices. If the employee's address is in a county where 10% or more of the population is literate only in the same non-English language, benefit denial notices must include a prominent statement in the relevant non-English language about the availability of language services. Upon request from the employee, plans are required to provide a verbal customer assistance process and written notices in the non-English language. Currently, Chinese, Navajo, Spanish and Tagalog are languages which meet this standard. There are 25 states, including Puerto Rico, that have counties where at least 10% of the population is only literate in the same non-English language. We will ensure a translation disclosure is added to all notices for the four languages required under the regulations, and utilize existing language translation vendor partners to translate verbal and written communication.

We are making the necessary changes to all notices, employee correspondence and training documentation as needed. Sedgwick's customers should contact their client services director for assistance with ERISA-related questions.

RESOURCES

Federal Register. EBSA final rule. Claims Procedure for Plans Providing Disability Benefits, December 19, 2016.
https://www.federalregister.gov/documents/2016/12/19/2016-30070/claims-procedure-for-plans-providing-disability-benefits

Sedgwick leave law updates.
https://www.sedgwick.com/news/Pages/newsletters.aspx

New California closed formulary law

BY **ROXANNE BROWN**

Director, Regulatory Compliance, Sedgwick

A new closed formulary law in California will be implemented on January 1, 2018. While the Department of Workers' Compensation posted a second 15-day comment period that ended on August 2, 2017, if passed as written, the closed formulary will impact all drugs dispensed on or after January 1, 2018 regardless of the date of injury. For injuries occurring prior to January 1, 2018, the Medical Treatment Utilization Schedule (MTUS) drug formulary should be phased in and the new regulations require the physician to provide a request for authorization to include a treatment plan setting out a safe weaning, tapering or transitioning of the worker to a drug that is listed on the MTUS, or provide supporting documentation to substantiate the necessity of the current drug regimen.

Medications and compounds impacted by the new closed formulary law include:

EXEMPT (examples – ibuprofen, diclofenac, acetaminophen)	**NON-EXEMPT OR UNLISTED** (examples – hydrocodone, lidocaine, Lyrica, gabapentin)	**COMPOUNDS**
Drug categories include, but are not limited to, anti-inflammatories and some antibiotics No prospective review or utilization review required before dispensing if in accordance with MTUS Physician-dispensed exempt drugs limited to one 7-day supply at initial visit within seven days of injury without prospective review	Drug categories include, but are not limited to, all opioids, muscle relaxants and most antidepressants Prospective review or utilization review required before being prescribed or dispensed	Prospective review or utilization review required before being dispensed

At Sedgwick, the safety of injured employees is the top priority and we have a team working to ensure that a smooth transition occurs as we educate customers, employees and prescribers about the new requirements of the regulations.

We are monitoring legislative changes related to the California closed formulary law and will continue to keep customers informed as new updates become available.

Gabapentin is now a controlled substance in Kentucky

BY **ROXANNE BROWN**

Director, Regulatory Compliance, Sedgwick

Kentucky has announced changes to all gabapentin products, making them a Schedule V controlled substance. The new schedule change became effective on July 1, 2017 and impacts prescribers and pharmacists. Only prescribers with a valid Drug Enforcement Administration (DEA) registration may issue a prescription for gabapentin. Not only are future prescriptions affected, but any current refills for gabapentin that were issued by a prescriber without a valid DEA registration will be deemed no longer valid. Prescriptions written by a practitioner with a valid DEA registration will be considered valid, but the prescription will expire after five refills or six months following the script date. All dispensed gabapentin prescriptions will be monitored and reported to the state of Kentucky's Prescription Drug Monitoring Program (KASPER).[1]

Gabapentin has two FDA approved uses, which are partial seizures and post-herpetic neuralgia. Non-FDA approved uses include diabetic peripheral neuropathy, fibromyalgia and post-operative pain. Long-term use of gabapentin and pregabalin (generic name) analogues augment the euphoric effects of opioids, increasing the risk of physiological/physical dependence and abuse potential.

There is now a greater emphasis placed on monitoring gabapentin and pregabalin analogue usage. The concern of abuse potential grows with the increasing use of these medicines. The Express Scripts Drug Trend Report of 2016 further demonstrated the increasing use of Lyrica, as Lyrica was part of the top ten traditional utilized drugs.[2] Use of Lyrica is expected to increase in the future, so careful monitoring of Lyrica and other gabapentin and pregabalin analogues is crucial in limiting the potential harm that may result from the overuse of these agents.

Sedgwick and our pharmacy benefits managers will work to educate prescribers, injured employees and pharmacies as this newly implemented law takes effect.

REFERENCES

[1] Gabapentin Becomes a Schedule 5 Controlled Substance in Kentucky – Kentucky Coalition of Nurse Practitioners & Nurse Midwives. N.p., n.d. Web. April 14, 2017. http://www.kcnpnm.org/news/340636/Gabapentin-Becomes-a-Schedule-5-Controlled-Substance-in-Kentucky-.htm

[2] http://lab.express-scripts.com/lab/drug-trend-report

RESOURCE

Gabapentin: The new high. Sedgwick Connection blog. Dr. Linda Manna, Clinical Pharmacist, Sedgwick. September 1, 2016. http://blog.sedgwick.com/2016/09/01/gabapentin-new-high/

OSHA makes compliance-related changes

BY **MALCOLM DODGE**

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OSHA EXTENDS 2016 ELECTRONIC REPORTING DATE

The U.S. Occupational Safety and Health Administration (OSHA) has extended the date for employers to submit injury and illness records electronically. While the final rule originally instituted a July 1, 2017 submission deadline, OSHA later extended the date to December 1, 2017. The administration has indicated that its electronic submission test site will be available in August, giving employers about four months to validate their electronic reporting processes. Below are the reporting requirements for employers. Additional information on the final rule is available on OSHA's website.

Employer requirements:

ESTABLISHMENTS WITH 250 OR MORE EMPLOYEES IN INDUSTRIES COVERED BY THE RECORDKEEPING REGULATION	Must submit information from their 2016 Form 300A by December 1, 2017
ESTABLISHMENTS WITH 20–249 EMPLOYEES IN CERTAIN HIGH-RISK INDUSTRIES	Must submit information from their 2016 Form 300A by December 1, 2017
ESTABLISHMENTS WITH FEWER THAN 20 EMPLOYEES	No reporting is required
EMPLOYERS WHO ARE PARTIALLY EXEMPT FROM RECORDKEEPING	No reporting is required

Sedgwick's experienced team offers a range of OSHA recordkeeping solutions. We can submit reports on behalf of customers that utilize our OSHA services or they can opt to submit the reports themselves. Customers with reporting questions should contact their client services director.

TIMEFRAME REDUCED FOR OSHA CITATIONS

According to the April 2017 congressional resolution, a recordkeeping citation must now be issued within six months of the violation; previously, the Occupational Safety and Health Administration (OSHA) could issue citations for up to six months beyond the five-year timeframe in which employers are obligated to maintain records on recordable workplace injuries and illnesses.

A congressional resolution approved in April 2017 limits the timeframe in which OSHA can penalize employers for violating its requirements to make and maintain records of workplace injuries and illnesses. On April 3, 2017, President Donald Trump signed into law H.J. Resolution 83, which nullifies the Department of Labor (DOL) rule titled "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness" (see 81 Federal Register 91792). The DOL rule, which served to clarify employers' ongoing obligations regarding those records, was issued in response to the U.S. District Court decision in *Volks Constructors v. Secretary of Labor*.[1] The court stated: *OSHA cited and fined petitioner Volks Constructors for failing to properly record certain workplace injuries and for failing to properly maintain its injury log between January 2002 and April 2006. OSHA issued the citations in November 2006, which was, as Volks points out, at least six months after the last unrecorded injury occurred. Because 'no citation may be issued... after the expiration of six months following the occurrence of any violation,' 29 U.S.C. § 658(c), we agree with Volks that the citations are untimely and should be vacated.*

The April 2017 resolution reduces OSHA's authority to issue citations for recordkeeping errors. Consistent with the *Volks* decision, a citation must now be issued within six months of the violation. (The resolution does not change employers' obligations to record and maintain OSHA records for the current year plus five years.) OSHA inspectors have abided by the *Volks* decision since 2012, so employers should see no change in the administration's processes for reviewing records.

REFERENCE

[1] ***Volks Constructors v. Secretary of Labor.*** **Decision date April 6, 2012.** https://www.cadc.uscourts.gov/internet/opinions.nsf/018A542863EAA754852579D8004EAFF4/$file/11-1106-1367462.pdf

RESOURCES

OSHA website. Final rule issued to improve tracking of workplace injuries and illnesses. https://www.osha.gov/recordkeeping/finalrule/

OSHA website. NAICS codes and industries list. https://www.osha.gov/recordkeeping/NAICScodesforelectronicsubmission.html

Congressional resolution limits timeframe for OSHA citations. Sedgwick Connection blog. Malcolm Dodge, VP of risk services, Sedgwick. April 7, 2017. http://blog.sedgwick.com/2017/04/07/congressional-resolution-limits-timeframe-for-osha-citations/

H.J. Resolution 83. 115th Congress. April 3, 2017. https://www.congress.gov/bill/115th-congress/house-joint-resolution/83

Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness. December 19, 2016. https://www.federalregister.gov/documents/2016/12/19/2016-30410/clarification-of-employers-continuing-obligation-to-make-and-maintain-an-accurate-record-of-each

U.S. Court of Appeals for the District of Columbia Circuit. *Volks Constructors v. Secretary of Labor.* Decision date April 6, 2012. https://www.cadc.uscourts.gov/internet/opinions.nsf/018A542863EAA754852579D8004EAFF4/$file/11-1106-1367462.pdf

New York introduces workers' compensation reforms

BY **DARRELL BROWN, ARM**

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On April 10, 2017, New York Gov. Andrew Cuomo signed the state's 2017–2018 budget bills, which include significant workers' compensation reforms. Click here to view the workers' compensation reforms in Part NNN of Senate 2009-C and its House companion, Assembly 3009-C (page 156). Sedgwick and many of our customers were involved in advocating for some of the key reform measures enacted.

Several related changes were announced as a result of the requirements in the budget bills. On July 17, 2017, the New York Compensation Insurance Rating Board (NYCIRB) announced a decrease of 4.5 percent in the overall loss cost level in New York effective October 1, 2017. According to a statement issued by the New York Office of the Governor, employers in the state will save an estimated $400 million in reduced premiums this year. Additionally, on July 28, 2017, the NYCIRB announced a 1.7 percent decrease of loss costs for policies with an effective date between April 10, 2017 and September 30, 2017.

The following key state budget provisions are not yet effective, but could create possible savings for employers:

- **Revisions to Medical Impairment Guidelines for Scheduled Loss of Use awards** – Requires the adoption of revised permanency guidelines by January 1, 2018; the guidelines are to be reflective of advances in modern medicine that enhance healing and result in better outcomes.
- **Creation of a prescription drug formulary** – The Workers' Compensation Board chair must establish a comprehensive prescription drug formulary on or before December 31, 2017.

The New York State Workers' Compensation Board (WCB) has issued several bulletins regarding the following provisions in the 2017 reforms:

- **Changes temporary disability durations** – Amends workers' compensation law to provide a credit for periods of temporary disability that extends beyond 2.5 years (130 weeks) from the date of injury. This rule applies to all injuries with dates of accident or disability after April 9, 2017.
- **Post-PPD labor market attachment** – Provides that after Board determination of permanent partial disability (PPD), a claimant who is entitled to benefits at the time of classification is no longer required to demonstrate ongoing labor market attachment. This change does not affect the question of attachment during periods of temporary disability prior to classification.
- **Creates safety valve** – Extends the period of temporary disability beyond 2.5 years (130 weeks) when the Board makes a determination that the claimant has not yet reached maximum medical improvement on that date. This applies to all injuries with dates of accident or disability on or after April 10, 2017.
- **Provides claimant right to hearing** – Requires the Board to hold a hearing within 45 days of request from a claimant if payments have not been started but the claim has not been denied under specific circumstances. Subject No. 046-937 explains when the 45-day hearing is appropriate.

- **Lowers extreme hardship determination threshold** – Claimants who are found to have a loss of wage earning capacity (LWEC) of greater than 75% may now apply for such determination (formerly the threshold was greater than 80%). The rule also applies to claimants whose claims were previously adjudicated with a LWEC greater than 75%. Subject No. 046-938 describes how an injured worker may apply for a reclassification redetermination under WCL § 35(3) and the standard the Board will use to determine whether the injured worker has met the burden of proving an extreme hardship.

- **Mandatory full board review** – When a Board Panel reduces an LWEC finding to below the safety net threshold, and the LWEC had previously been determined by a workers' compensation law judge (WCLJ) to exceed the threshold, any request for full board review will be considered a request for mandatory full board review.

Other workers' compensation reform measures in the state's 2017 budget bills include:

- **Limits defense in mental injury claims involving first responders** – Prohibits the WCB from disallowing mental injury claims because the stress was not greater than that which usually occurs in the normal work environment if filed by a police officer, firefighter, emergency technician, paramedic or other person certified to provide medical care in emergencies, or an emergency dispatcher (due to extraordinary stress incurred in a work-related emergency).

- **Adds establishment of the Board's performance standards** – Empowers the WCB to administratively assess an aggregate penalty to any carrier or self-insured employer that fails to meet established performance standards.

- **Requires a study of independent medical examination (IME) utilization** – Directs the WCB chair to conduct a study of IME utilization in New York and convene an advisory committee consisting of relevant stakeholders and experts.

- **Requires an annual report of overall system savings as a result of the 2017 reforms** – The public actuary must issue a report on or before June 1, 2018, and each of the next 10 years, that indicates the overall savings in the workers' compensation system as a result of the 2017 reforms.

We are preparing to implement the changes and will continue to monitor the Board's activity regarding implementation of the formulary and revision to guidelines for scheduled loss of use awards.

RESOURCES

New York State Assembly website. Part NNN of Senate 2009-C and House companion, Assembly 3009-C (page 156). January 23, 2017. http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=S02009&term=2017&Text=Y

NYCIRB website. Workers' compensation loss cost filing effective October 1, 2017. July 17, 2017. http://www.nycirb.org/bulletins/rc2437.pdf

NYCIRB website. Worker' compensation premium credits to reflect 2017 reforms. July 28, 2017. http://www.nycirb.org/bulletins/rc2439.pdf

Governor Andrew S. Cuomo website. Governor Cuomo Announces New York employers workers' compensation premiums will be reduced by about $400 million. May 15, 2017. https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-employers-workers-compensation-premiums-will-be-reduced-about

WCB Bulletins and Subject Numbers. 2017 workers' compensation reforms. April 25, 2017. http://www.wcb.ny.gov/content/main/SubjectNos/sn046_936.jsp

WCB Bulletins and Subject Numbers. Subject No. 046-937. Urgent hearings where claimant is not being paid. April 26, 2017. http://www.wcb.ny.gov/content/main/SubjectNos/sn046_937.jsp

WCB Bulletins and Subject Numbers. Subject No. 046-938. Extreme hardship redetermination procedure. April 26, 2017. http://www.wcb.ny.gov/content/main/SubjectNos/sn046_938.jsp