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Workers' Comp

Reflecting on 2017: Predictions for 2018 in Workers' Compensation

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Brian Allen provides insight into what may be on the horizon.

The famous author and anthropologist Edward Weyer, Jr. once said, "The future is like a corridor into which we can see only by the light coming from behind." As we look to see what is coming in workers' compensation policy in 2018, our best predictions are illuminated by recent policy activity. Here is what we believe will be the big issues in workers' compensation for 2018.

Opioids

Legislative and regulatory policy around opioids will continue to be a hot topic heading into 2018. In late December 2017, the Center for Disease Control and Prevention (CDC) released a mortality report indicating that deaths from opioids continued to rise in 2016. This increase occurred despite the fact that many states have enacted laws or regulations imposing controls on the prescribing of opioid medications. Additionally, the Utah Insurance Department recently compiled a report looking at self-identified opioid prescribing policies by health and workers' compensation insurers. This report indicated that a number of health plans, though allegedly following CDC guidelines, still don't trigger a hard review of an opioid prescription unless the daily morphine equivalent (MED) dose exceeds 200. The CDC Guidelines, in contrast, recommend a maximum dose of 90 MED. Workers' compensation insurers were not very specific about MED triggers, but most indicated adherence to ODG, ACOEM, and/or the CDC opioid prescribing guidelines. However, some of the policies submitted were merely a few sentences echoing state law and subsequent review of these policies may encourage policy makers to strengthen the requirements to follow specific guidelines.

While positive strides have been made toward combating opioids in the workers' compensation system, more needs to be done.

Thankfully, legislators and regulators have a strong desire to curtail the use of opioids in their states.

- At the beginning of 2018, North Carolina announced a proposed rule to impose a 5- to 7-day limit on initial opioid prescriptions.
- Additionally, South Carolina Governor, Henry McMaster, asked the state's legislature to consider imposing a 5-day limit on initial opioid prescriptions.
- California Assembly Member, Evan Low, introduced a package of bills designed to enhance and accelerate reporting timeframes for the state's CURES (drug monitoring) database and to allow for the cooperative sharing of drug database information across state lines.

This is just the beginning of another potential wave of legislative proposals targeting opioids. We expect to see tightening of prescribing limits, mandatory requirements for Prescription Drug Monitoring Programs (PDMPs) and a sharing of PDMP data across state lines.

Drug Formularies

Drug formularies are another strategy to reduce the use of opioids in the workers' compensation system. States that have employed drug formularies for injured workers have seen a measurable decrease in the use of opioids in their workers' compensation systems. This is an excellent example of looking back to shape the future; the formularies some states have already created will help other states develop their own. For example, California's drug formulary went into effect January 1, 2018. Other states interested in developing formularies have looked to California's approach, as it was different from others primarily due to its formulary vendor selection. In the waning days of 2017, New York announced that they had selected the same vendor as California and the accompanying New York rule looks very similar to one in California. The New York rule is in a public comment period until March 4, 2018. The proposed effective date for the New York formulary is July 1, 2018. Hopefully, the New York Workers' Compensation Board will be watching the roll out of California's formulary to see if there are any lessons they can learn. Other states are looking at the topic of formularies in the upcoming year as well:

- Arkansas has a drug formulary taking effect on July 1, 2018. The state is employing a formulary developed by the UAMS College of Pharmacy Evidence Based Prescription Program.
- Montana has announced that they are moving forward on a drug formulary, and we expect to see a draft rule in the first half of 2018.
- The Pennsylvania legislature has been considering a drug formulary proposal for nearly a year. Pennsylvania's HB18 stalled in the House, but SB 936 passed out of the Senate and is now awaiting action by the House Labor and Industry Committee. A drug formulary was contemplated in the Pennsylvania legislature for several years, but we think that 2018 will be its year.

We fully expect other states to begin serious consideration of a drug formulary for their workers' compensation systems in 2018, as states such as Texas and Ohio were able to share positive successful metrics.

Compounded Medications

Compounded medications remain a significant cost-driver in many states, yet don't seem to provide a commensurate clinical benefit. Over the last year, we have seen a number of states move to curtail compound use by requiring a prior authorization review before the medication can be prescribed.

- Texas released an informal draft rule for comment last year that would require all compounded medications to receive a prior authorization *before* being prescribed. Currently, compounded medications containing all "Y" ingredients, as indicated on the ODG Appendix A, are only subject to retrospective review. We anticipate a formal version of the rule to be released in January 2018.
- In its draft rule, New York does not include compounded medications in its formulary. Once that rule becomes effective, absent any changes to the status of compounds, all compounded medications will require prior authorization before being dispensed.

As other states adopt drug formularies, we expect that compounds will not be included as recommended medications and will therefore be subject to prior authorization.

Physician Dispensing

The dispensing of medications by physicians has been an issue in workers' compensation for a number of years. Over the last few years, it has been eclipsed in importance and attention by opioids, drug formularies and compounded medications. However, we predict that this topic will re-emerge in 2018.

In the previous battle against physician dispensing and re-packagers, legislators and regulators initiated reimbursement rules tying costs back to the average wholesale price of the original product used in the repackaging process. The victory was short-lived, since re-packagers approached manufacturers and had them create "boutique" strengths of medications with significantly inflated prices that are distributed only through the re-packing industry. California took a significant step forward on this issue by requiring in their drug formulary that all physician-dispensed medications to be prior authorized, except for limited prescriptions during the first seven days following an injury. It will take some time to see the results of California's effort, but if it has the desired impact, we believe other states will follow suit.

Legalized Marijuana

Marijuana and its impact in the workplace is a topic that continues to evolve. As of January 1, 2018, recreational use of marijuana is now legal in California. Although we don't predict significant changes to employer policies regarding drug-free and safe workplaces, the legalization of recreational marijuana does pose some potential additional risks to employers from safety issues to potential litigation issues.

> **California joins seven other states and the District of Columbia in 2018 that allow recreational use of marijuana. Additionally, twenty-nine states allow for the use of marijuana for medical purposes.**

Reimbursement of medical marijuana in workers' compensation claims emerged as a hot topic in the past year. Recent court or administrative cases in New Mexico, Maine, New Jersey and Minnesota have determined that employers or insurance carriers *are* required to reimburse injured workers using medical marijuana to treat a workplace injury. However, other states such as Florida do not allow for reimbursement and many others have not addressed the issue at all.

Clearly, marijuana is a complicated issue that is not going away anytime soon. In fact, a greater haze was cast over this issue with the recent release of a memo by US Attorney General Sessions. This memo rescinded an Obama-era order of non-enforcement of marijuana laws and related banking and money laundering laws. Consequently, the Sessions memo now gives broad prosecutorial discretion to local offices, putting the US Government squarely at odds with those states that have legalized medical and recreational marijuana. This also potentially puts payers at risk for paying or reimbursing for medical marijuana. Despite the Sessions memo, we expect more states may broaden existing medical marijuana laws, adopt their first medical marijuana laws or take their first step into the recreational marijuana arena. For instance, Utah has a ballot initiative moving forward that would allow the use of medical marijuana. Utah Governor Gary Herbert said he expected the measure would pass. Oklahoma, Kentucky, South Dakota and Missouri could join Utah in granting broad access to medical marijuana. Additionally, Vermont, New Jersey, Michigan, Delaware, Rhode Island and Ohio are poised to make major steps forward on legalizing recreational marijuana.

Managed Care

As more focus is placed on managing outcomes, policy makers may also consider more formalized managed care in an effort to produce better results. Most states allow employers to encourage the use of a network provider by an injured worker, but the states do not require this. With unemployment rates moving downward, employers have a harder time finding qualified employees. Because of this, we expect to see a shift in 2018 toward return-to-work programs and achieving better outcomes following an injury so skilled workers can return to the workplace.

> **Managed care is a tool that policy makers and claims administrators can use to create a collaborative care environment where all parties are focused on achieving the best medical and professional outcomes for an injured worker.**

Health care providers have been talking about outcome-based reimbursement models for several years. For workers' compensation, however, whether or not a provider is reimbursed on results may not matter as much. Better outcomes will ultimately lead to happier injured workers and lower costs. In past years, there has been a lot of pressure at the legislative and regulatory levels to allow for complete provider discretion on the part of the injured worker. As claims become more complex and specialized, and as we see more states grappling with potential provider fraud or abuse, the reluctance to adopt managed care options on the part of policy makers is subsiding. A quality managed care environment could help employers better serve their injured employees. Ultimately, this approach will benefit injured workers by providing high caliber care in a coordinated fashion with good communication among the various providers, claims administrators and the injured worker. Achieving the best possible result is key.

Fee Schedules

A couple states considered fee schedules in 2017:

- Virginia finalized a fee schedule for medical procedures. We expect the Virginia Workers' Compensation Commission to also consider a pharmacy fee schedule in 2018.
- The Wisconsin Medical Advisory Board had recommended a fee schedule proposal to their legislature in 2017, but were unexpectedly rebuffed. We expect the Board to advance the idea to the legislature again in 2018.

There seems to be a natural cycle to workers' compensation reform efforts and 2018 could herald in a new round of fee schedule discussions in several states. It has been a while since a number of states have made changes, but upcoming elections may spark discussions.

Telehealth

Telehealth is coming of age in 2018. We anticipate a number of states to advance telehealth legislation, not necessarily specific to workers' compensation, but as general policy for the broader health care system. There has been an ongoing battle around the country over reimbursement for telehealth services and whether or not reimbursement should be the same rate as an in-person visit. We expect that policy debate to continue.

Some states will be looking to use telehealth to carve out solutions for specific problems. For example, Utah is considering a telehealth solution to deliver mental health services to the homeless and other remote populations in their state. Policy issues aside, we expect telehealth to gain in popularity and we anticipate some workers' compensation specific solutions to emerge this year.

The "Grand Bargain" and Litigation

Nothing spurs future activity like past success. Given the positive rulings achieved by some plaintiffs challenging the constitutionality of a state's workers' compensation law, we see this as an ongoing distraction, if not a concern. We live in an industry where you can get 100 claims right and the one that goes south is the one that makes the news. News reports over the last few years taking shots at the industry have served to create a dialogue where the needs and care of an injured worker are more openly and frequently discussed.

> **Improvements are underway, but we still expect that some states will experience legal challenges to their workers' compensation laws.**

In most cases, the solution to the litigation is a simple legislative fix (if there is such a thing), that is unfortunately fraught with all kinds of political landmines. A good example is the recent case in Florida dealing with attorney's fee. The fix would be relatively simple, however finding consensus on the fix has proven to be elusive.

In summary, we fully expect 2018 to be illuminated by past legislative, regulatory and legal activities. It takes time for good policy to sweep the country and just as it does, new policy concepts are sure to arise. Learning from the past and building on positive precedent is part of the natural political environment in which we live. Politics is a lot about managing risk and the safest path is often looking back to one that has been successfully trod by others.

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