Workers' Comp

StateWatch: Winter 2018

November 5, 2018
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Keep current with new legislation and its potential effect on your organization. This regulatory update is for informational purposes only, and provides some key highlights on state initiatives that may impact the services Genex provides.

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National

The **National Council of Insurance Legislators** (NCOIL) recently approved amendments to a model law for physician dispensing and compounded medications in workers' compensation during the organization's annual meeting in Oklahoma City. The NCOIL Workers' Compensation Insurance Committee adopted amendments to the NCOIL Model Act on Workers' Compensation Repackaged Pharmaceutical Reimbursement Rates. A draft of the model law addresses repackaged drugs dispensed by physicians, saying that "a repackaged NDC number shall not be used and shall not be considered the original manufacturer's NDC number." For states with a fee schedule, maximum reimbursement under the model law would be the lesser of the fee schedule amount of the underlying or original manufacturer's NDC, or the contract rate as agreed upon between the payer and the provider.

In other NCOIL news, the council passed a model law that would make it easier for states to increase regulation of pharmacy benefit managers (PBMs). Under the model act, PBMs would be required to register with the insurance commissioner in states where they operate. The insurance commissioner would issue rules regarding licensing, financial standards and reporting requirements for the PBMs.

The **Centers for Medicare and Medicaid Services** (CMS) is reportedly adding brand-name drug Lyrica to workers' comp Medicare Set-Aside proposals as a treatment for certain low back conditions. According to *WorkCompCentral*, the trend, which MSA professionals began noticing a few months ago, can add hundreds of thousands of dollars to an MSA. And some say the use of Lyrica for treating low back pain and radiculopathy is

questionable based on recent research. The practice is also causing worry that other brand-name drugs will start showing up more often in MSAs. In its workers' comp MSA reference guide, CMS spells out when it is appropriate to include medications in an MSA, such as when a drug has been approved by the FDA for an injured worker's condition.

The **FDA** recently approved the first sufentanil (opioid analgesic drug) sublingual tablet for acute pain in health care settings. Dsuvia was developed for the management of moderate-to-severe acute pain in a variety of medically-supervised settings. It will not be available for home use or in retail pharmacies.

According to a recent **Integrated Benefits Institute** report, poor health costs U.S. employers $530 billion and 1.4 billion work days of absence and impaired performance per year. The researchers also indicated U.S. employers paid nearly $880 billion in health care benefits for employees and dependents, amounting to 60 cents for every dollar employers spend on health care benefits. Additionally, employees covered for sick time, workers' compensation, disability, and family and medical leave benefits are absent about 893 million days due to illness and incur an estimated 527 million lost work days due to impaired performance, according to the report.

The **U.S. Department of Labor** announced eight states (California, Ohio, Connecticut, Minnesota, Kentucky, Vermont, Kansas, Washington) have been selected to participate in a pilot project to develop early intervention strategies to expediate return to work for injured and sick employees. The five-year, $100 million project will focus on improving the quality of life of injured workers and curtailing the need for Social Security Disability Insurance and other government assistance programs. Five of the states will receive the maximum $2.5 million for phase 1 of the program called RETAIN (Retaining Employment and Talent After Injury) with the possibility of a follow-up award of $19.75 million for phase 2.

According to **Lockton Companies Inc.,** a privately held insurance brokerage firm, older employees who are hurt on the job tend to have more severe injuries than their younger counterparts. Lockton researchers determined that average claim costs increased by $722 for each year of employee age between 20 and 50. The average incurred cost per lost-time claim was about $15,000 for 20-year-old workers, growing to roughly $35,000 for their 50-year-old counterparts. The increases leveled off somewhat between ages 50 and 60. The figures came from an analysis of a database derived from Lockton's book of business that contains 584,310 claims from calendar years 2013 to 2017, valued at 18 months. Lockton excluded claims greater than $250,000 "to minimize the impact of unusually large claims." According to the report, for workers in a 16-24 age group, lost-time claims made up 9.9 percent of total claim count and 74.1 percent of all incurred costs for that age group. For workers 55 and older, lost-time claims accounted for 23.2 percent of total claims and 89.9 percent of incurred costs for the age group.

The **Department of Justice** has announced it is awarding nearly $320 million to combat the opioid crisis in America. The unprecedented funding will directly help those most impacted by the deadliest drug crisis in American history, according to the department.

According to a recent **National Council on Compensation Insurance** (NCCI) report, out of more than 800 pieces of workers' compensation related legislation considered in 2018, about one in eight pertained to first responders. NCCI tracked approximately 814 state or federal workers' comp bills this year and found first responders were the subject of 103. The bills addressed compensability for certain cancers and other diseases occurring in first responders, compensability for post-traumatic stress disorder, marijuana legalization, opioids and air ambulance issues.

The **FDA** is planning a study on the safety and effectiveness of compounded topical pain creams. The administration announced an agreement with the **National Academies of Science, Engineering & Medicine**

(NASEM) to look at available evidence regarding the pain creams, which typically contain multiple active pharmaceutical ingredients. This includes adverse events, ranging from skin reactions to death, in patients who have applied the pain creams. NASEM will provide recommendations for the creams based on its research and also examine the usefulness of treating patients with compounded bioidentical hormone replacement therapy products.

The **Workers Compensation Research Institute** (WCRI) recently released an "inventory" that shows how each of the 50 states regulates pharmaceuticals. The report contains tables addressing areas of interest specific to the workers' compensation industry, such as rules that limit and require monitoring of opioid prescriptions, drug formularies and medical marijuana regulations. WCRI officials report state regulators have responded to rising costs and drug abuse by passing myriad regulations, including cost-containment rules addressing either controls on the price of drugs, the quantity, or the selection. States have also approved formularies addressing the selection of drugs, serving the dual purpose of encouraging more medically appropriate treatments. WCRI cautioned that the report is a snapshot of the regulations as of Jan. 1, 2018, and is necessarily outdated as the states continue to adopt and amend rules. The WCRI national inventory of prescription drug laws is available for purchase on its website.

CALIFORNIA

The **Division of Workers' Compensation** (DWC) posted an order adopting regulations to update the evidence-based treatment guidelines of the Medical Treatment Utilization Schedule (MTUS). The updates, effective for medical treatment services rendered on or after Oct. 31, incorporate by reference the American College of Occupational and Environmental Medicine's (ACOEM's) most recent treatment guidelines to the General Approaches and Special Topics sections of MTUS. The ACOEM guidelines incorporated by reference are:

- Traumatic Brain Injury Guideline (Nov. 15, 2017)
- Prevention (May 1, 2011)
- General Approach to Initial Assessment and Documentation (July 25, 2016)
- Cornerstones of Disability Prevention and Management (May 1, 2011)

The DWC also issued an order updating the MTUS Drug List effective Oct. 1, pursuant to Labor Code section 5307.29. The update adopts changes to the MTUS Drug List, based on the American College of Occupational and Environmental Medicine (ACOEM) Practice Guidelines, including the following:

- Addition of drugs addressed in the Chronic Pain Guideline and Opioids Guideline
- New, revised, and deleted drug recommendations (related primarily to the Chronic Pain Guideline, and the Opioids Guideline)

The **DWC** also adopted rules that implement Medicare's Geographic Practice Cost Index for the state's Official Medical Fee Schedule, marking the first time the state has set regional prices for medical services.
The amendments to California Code of Regulations Section 9789.12.1 through 9789.19.1 replace the average statewide geographic adjustment factor with local geographic adjustment factors, effective Jan. 1, 2019.

In other news, the **Insurance Commissioner** announced that California will recognize a new adjuster licensing mechanism. The Universal Claims Certification (UCC) was designed by the Claims and Litigation Management Alliance with the hope of establishing a nationally accepted standard for claims adjusters. The UCC program

sets requirements for licensees that exceed the requirements under current California law.

The **Division of Occupational Safety and Health** (Cal/OSHA), announced the Office of Administrative Law has approved emergency rules related to the electronic reporting requirement. California employers with 250 or more workers will now be required to submit injury reports electronically.

The **Medical Board of California** posted answers to frequently asked questions (FAQ) about provider requirements to consult with the state's prescription drug-monitoring database when prescribing certain controlled substances. Effective Oct. 1, providers are required to query the Controlled Substances Utilization Review and Evaluation System (CURES) and run a "patient activity report" the first time a patient is prescribed a Schedule II through IV drug. Additionally, doctors must also consult CURES at least once every four months for as long as the controlled substance remains part of the treatment plan. Providers are not mandated to document that they consulted the CURES database, but the Medical Board recommends it. The board indicated it has access to audit data on the activity of CURES users that can be used to assess compliance. The board can also receive complaints from a patient or another health care professional about non-compliance. Failing to consult CURES is a violation of the law and could result in a citation or disciplinary action as severe as license revocation, the board said. The Medical Board's CURES informational page can be found here.

WCIRB has released the California Workers' Compensation Aggregate Medical Payment Trends report comparing medical payment information from 2015 to 2017. The WCIRB analysis is based on medical payment data representing 92 percent of the California workers' compensation insurance market.

Starting Jan. 1, the **Workers' Compensation Insurance Rating Bureau** will no longer count the first $250 of the cost of a claim against employers' experience modifications. The move is part of an effort to encourage reporting of all claims, including those that require only medical treatment.

COLORADO

The **Colorado DWC** released its updated Fee Schedule/Rule 18 and Medical Treatment Exhibits for 2019. The updated fee schedule will be effective for all dates of service on or after Jan. 1, 2019. The DWC also announced its making changes to its Division Independent Medical Exam (DIME) program. The changes take effect Jan. 1.

CONNECTICUT

The **Connecticut Workers' Compensation Commission** has revised its mediation guidelines, which became effective Nov. 1.

FLORIDA

The **Florida Division of Workers' Compensation** recently released new reimbursement manuals and fee schedules that would raise fees for most procedures for hospitals, doctors and ambulatory surgery centers. The manuals also add several new current procedural terminology codes to the list of procedures assigned maximum reimbursement allowances (MRAs).

In other state news, **SB 376** became effective Oct.1. The bill expanded workers' compensation coverage to cover post-traumatic stress disorder for first responders like firefighters, EMTs, law enforcement officers and others.

KANSAS

The **Kansas Division of Workers' Compensation** adopted the International Association of Industrial Accident Boards and Commissions' Claims Release 3.1 Standard on Nov. 29. It also launched its Online System for

Claims Administration Research/Regulation, or OSCAR. The electronic data interchange will be integrated into the OSCAR system.

KENTUCKY

The **Kentucky Department of Workers' Claims** (DWC) has chosen the Official Disability Guidelines (ODG) as its medical treatment guidelines and pharmacy formulary source. Workers' compensation reform legislation enacted earlier this year (HB 2) required the DWC to develop or adopt a formulary, on or before Dec. 31, and to develop or adopt additional evidenced-based medical treatment guidelines for areas including, but not limited to, chronic pain management and opioids, on or before Dec. 31, 2019.

MASSACHUSETTS

According to recent **Workers' Compensation Research Institute** (WCRI) CompScope Medical Benchmarks report, Massachusetts had the lowest medical payments per lost-time claim and the lowest costs of 18 states studied. The report noted factors such as the state's mandatory utilization review for treatment of more than 12 weeks, treatment guidelines applied during the first 12 weeks and fee schedule caps as contributors to lower costs. The WCRI study is available for purchase here.

MINNESOTA

The **Minnesota Department of Labor and Industry** has approved rule changes that slightly increase fees for medical and vocational rehabilitation services, and increase the threshold for medical, hospital and vocational rehabilitation services for catastrophically injured patients.

MONTANA

WATCHLIST: In October, the **Montana Department of Labor and Industry** (DLI) published draft drug formulary and treatment guideline rules and amendments. The proposed rule adopts the Official Disability Guidelines (ODG) drug formulary and amends rules to detail how the ODG drug formulary will be operationalized in Montana.

NEW JERSEY

WATCHLIST: **A4505** was introduced in the New Jersey Assembly. This bill would require workers' compensation carriers to cover medical marijuana for injured workers, provided that the insured or the employee is a qualifying patient authorized for its use. Per the bill, at least one other medication or treatment must be tried before the worker can qualify for marijuana. The bill has been referred to the Assembly Financial Institutions and Insurance Committee.

NEW YORK

Gov. Cuomo recently signed **SB 8987** into law, expanding the number of conditions that are eligible for treatment under the state's approved medical marijuana program. This includes pain that degrades health and functional capability where the use of medical marijuana is an alternative to opioid use and substance use disorder. The goal of the legislation is to allow prescribers treating patients with these conditions to better manage the underlying pain and disorder through approved medical marijuana treatment and, thus, reduce reliance on opioids.

According to a recent Oregon Department of Consumer and Business Services report, New York exceeded California as the most expensive state in the nation for workers' compensation insurance. The biennial study

ranks all 50 states and Washington, DC, based on premium rates that were in effect Jan. 1, 2018.

WATCHLIST: **A11372** was introduced in the New York Assembly in October. The bill would require insurers to notify workers when their claims representative has changed. The notification may be done through email or traditional mail, and must include the name and contact number of the new claims rep.

WATCHLIST: **A11390** is a medical marijuana bill introduced in late October. According to the bill sponsor, the reason for the legislation is twofold because "marijuana has been shown to be a safer alternative to addictive opioids, but its cost can still be out reach of some low-income patients". This initiative is seen as another step toward full legalization of medical marijuana in New York. However, according to some industry experts, it leaves unanswered questions that may have to be hashed out by the courts for years to come and it does not resolve the federal-state conflict over the legality of the drug. The bill stipulates that public insurance programs, including Medicaid and workers' compensation, would have to pay for medical marijuana if prescribed in accordance with state regulations. Currently, under New York law, medical marijuana is already legal for certain conditions, including cancer, AIDS, epilepsy, multiple sclerosis and chronic pain. Patients must be registered and obtain a "marijuana card," showing their eligibility, and the drug can only be prescribed by a physician.

WATCHLIST: The **New York State Workers' Compensation Board** has released a revision to the proposed NYS Workers' Compensation Drug Formulary announced in Subject Number 046-1012 from December 2017. The proposed revision is in the Oct. 17, 2018 State Register, and the Board will accept comments for 30 days. The revised proposed regulations are also available on the Board's website.

OREGON

The **Oregon Workers' Compensation Division** is adhering to a previous decision that platelet-rich plasma (PRP) is a non-compensable treatment for injured workers, despite growing interest in the therapy. The Oregon Medical Advisory Committee reviewed more than 80 published research studies on PRP for treatment of shoulder, low back, knee, hip or other parts of the body and determined evidence regarding its effectiveness was not convincing. According to the report, the advisory committee plans to re-evaluate the compensability of PRP in 2020, if not sooner, as new research becomes available.

The **Department of Consumer and Business Services** recently announced that, effective immediately, self-insured employers and self-insured employer groups in Oregon will no longer get an extra 14 days to submit annual claim-loss data before they risk civil penalties. Self-insured employers and self-insured employer groups are required to submit an annual report of losses by March 1 for the purpose of determining experience rating modifications, security deposits and retrospective rating calculations.

Pennsylvania

The **Pennsylvania Compensation Rating Bureau** (PCRB) submitted two filings to the Pennsylvania Insurance Department: Filing No. C-372 (the "Interim Loss Cost Filing") and Filing No. C-373**.** These filings are applicable for policies with effective dates of Jan. 1, 2019 or later. More information can be found in Circular No. 1713.

Gov. Wolf recently signed into law the "Protz fix" bill, along with a measure that aims to rescue the state's ailing Uninsured Employers' Guaranty Fund. HB 1840 restores the use of the sixth edition of the American Medical Association's impairment rating guides after the state Supreme Court had struck it down in Protz v. Workers' Compensation Appeals Board in 2017. The court said the previous law was unconstitutional because it required "the latest edition" of the guides, which delegated too much authority to a non-governmental body. HB 1840, which took effect upon signing, specifies the use of the sixth edition, even though it has met with controversy

and court challenges in other states because some impairment ratings provide injured workers with little or no benefits.

TEXAS

The **Texas Division of Workers' Compensation (DWC)** is overhauling its designated doctor rules with the hope of improving the efficiency and effectiveness of the system. The changes to Chapter 127 of the Texas Administrative Code include new certification requirements and a revised scheduling system that aims to draw more medical doctors and doctors of osteopathy into the system. According to the TDI bulletin, the amendments are designed to provide balance and transparency in the designated doctor assignment process, retain doctors qualified to perform examinations, ensure availability of doctors qualified to evaluate injured employees, clarify designated doctor qualification standards and update certification requirements**.** The new rules became effective Dec. 6.

To ensure compliance, the **DWC** posted a reminder that effective Dec. 6, system participants must start using two new forms: DWC Form-032 and Form-068. Completion of Form-032 is mandated for designated doctor exam requests, and Form-068 must be used to report results. The new form requirements are the result of recent changes in Chapter 127 regulations.

The **DWC** also recently approved regulations that remove a mandatory preauthorization exemption for credentialed work hardening and work conditioning providers. Concurrently, the division dropped a proposal to decrease maximum fees for accredited facilities to the same rate as non-accredited facilities in response to input from the public. The proposed change to Texas Administrative Code 134.230 would have amounted to a $13-per-hour pay cut for accredited providers, saving insurers an estimated $200,000 annually. The DWC indicated it may reevaluate work hardening and work conditioning fees in the future to "ensure fees are fair, reasonable and designed to not only ensure quality medical care but to also achieve medical cost control." The change in policy concerning preauthorization was mandated by SB 1494, approved by the state legislature in 2017. Up until this point, health care facilities certified by the commission on Accreditation of Rehabilitation Facilities were exempt from preauthorization requirements. Research by the DWC found that accreditation had no impact on outcomes for injured workers.

In other state news, provider networks scored favorably in several areas of workers' compensation according to new report cards issued by the **DWC.** This includes an increase in new cases filed within the Texas workers' compensation medical networks, which now represent 50 percent of all claims. The cost of care in networks continued to decline and is now lower than non-network care, according to the **DWC**. Networks also returned 94 percent of claimants to their jobs, compared to 88 percent for those who were treated by non-network providers, and claimants in networks had an average physical functioning score of 45.4, compared to 43.2 for non-network claimants. Mental functioning scores averaged 52.1 for networks, 51 for non-network claimants. Differences in opioid distribution were minimal, however, with network claimants receiving, on average, two opioid prescriptions, compared to 2.03 for non-network claimants.

According to a recent **Texas Department of Insurance** (TDI) report, 84 percent of injured workers receive care within seven days of injury. The research also shows that as the number of claims in Texas has dropped in recent years, so has the number of patients per physician, from 19 in 2006 to 15 in 2017.

WATCHLIST: The **Texas Division of Workers' Compensation** is making another attempt at proposing rules to comply with 2017 legislation that directed it to lighten its approach toward imposing penalties for minor violations of its regulations. The division recently indicated that it is withdrawing p



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