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The Impact of the Patient Protect and Affordable Health Care Act of 2010 On State Workers' Compensation Systems

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I Introduction

The relationship between national health care reform and workers' compensation is not a new issue.[1] Whenever there is a serious discussion about some form of national involvement in the delivery or financing of general health care, the question arises: how does workers' compensation fit in to this plan? The question is a logical one for state workers' compensation and federal health care reform share a number of common concerns. Both strive to provide meaningful access to care; both aim to stem the tide of rising costs; and each is concerned about how to coordinate with the other. But, the devil is in the details.

The 1972 Report of the National Commission on State Workmen's Compensation Laws briefly spoke to this issue. That Report took the position that it would be unwise and unnecessary for any national health insurance program to assume workers' compensation medical costs. In the view of the Commission, folding workers' compensation medical costs into a national health insurance program "would be inconsistent with a central tenet [of workers' compensation]...that the costs of work-related injuries and diseases should be allocated to the responsible source, and will be unnecessary if our recommendations for medical care under workmen's compensation are adopted."[2]

The Clinton Administration tackled national health insurance again in the 1990's. The administration's initial proposals favored merging the medical component of workers' compensation into a federal health care system. Proponents of "full integration" or "merger"

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[1]For an excellent overview of how universal health insurance might affect workers' compensation see Gregory Krohm, Universal Health Insurance and Workers' Compensation, 46 IAIABC Journal 169 (2009).

[2]The Report of the National Commission on State Workmen's Compensation Laws 81 (1972).

believed that the unification would reduce administrative costs which would produce savings that would offset costs to employers in supplying health insurance. This, in turn, might help generate political support for expanding the federal role in health care. This proposal failed to garner any significant support outside of the White House. In fact, it prompted considerable opposition. Business owners apparently concluded that shifting medical costs from workers' compensation to general health insurance would not produce any real savings. The Clinton administration backed off of this "full integration" approach and instead advanced other proposals that had less encompassing treatments of workers' compensation. One of the proposed bills would have retained the employer's obligation to provide medical benefits under workers' compensation laws, but would have pre-empted state "choice of provider" laws and empower employees to select providers from any federally approved health plan. Other proposals simply required workers' compensation medical providers to comply with various federal laws. Of course, none of these bills were enacted into law.[3]

The reforms proposed first by candidate and then President Obama, took slightly different forms at different times. Candidate Obama forcefully advocated for a form of a "national health insurance" which President Obama later toned down into a "public option." At no time did the Obama proposals call for the full integration of workers' compensation into a national health care system. Rather, they called for the creation of a federal insurance provider that would be, in essence, an additional available payer, much like Medicare. As we know, the public option did not survive the political battle.

The law that was ultimately passed is known as the Patient Protection and Affordable Care Act (PPACA) (H.R. 3590) and the modified, as enacted, Reconciliation Act of 2010 (H.R. 4872). Just how will this federal law affect state workers' compensation systems? As discussed in more detail below, the federal legislation will have little direct impact on workers' compensation and as far as indirect effects are concerned, preliminary commentary is admittedly speculative.

II An Overview of the PPACA[4]

There are an estimated 46 million people living the in United States who do not have any health insurance. That amounts to approximately 15% of the population. One of the goals of the PPACA is to reduce the number of the uninsured. This goal is to be accomplished by a series of mandates, incentives, subsidies and tax credits.

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[3]This account of the Clinton health care proposals is taken from Debra T. Ballen, The Sleeper Issue in Health Care Reform: The Threat To Workers' Compensation, 79 Cornell L. Rev. 1291, 1295-98 (1994).

[4]Excellent summaries of the PPACA can be found at Lawrence O. Gostin and Elenora E. Connors, Health Care Reform–A Historic Moment in U.S. Social Policy, 303 J.A.M.A. 2521 (2010); The Henry J. Kaiser Family Foundation, Focus on Health Reform: Summary of the New Health Reform Law (June 18, 2010).

Individual Purchase Mandates

Perhaps the most controversial aspect of the PPACA is the mandate that individuals purchase and businesses with 50+ employees offer health insurance beginning in 2014. Tax penalties will be assessed on individuals who do not purchase insurance ($695 or 2.5% of household income) and fines will be imposed on affected businesses that do not offer insurance to their employees ($2,000 per employee). A combination of tax credits and subsidies are included to make complying with these mandates within the financial grasp of those affected.[5]

Expanding Medicaid Coverage

The PPACA also will increase the number of people having health insurance by expanding Medicaid coverage. Persons earning 133% of the federal poverty level will become eligible for Medicaid. This expansion of eligibility is projected to add 16-20 million people to the Medicaid roster.

Health Insurance Exchanges

The PPACA requires states by 2014 to create new clearinghouses of information, referred to as Health Insurance Exchanges, that will enable individuals and businesses to become more knowledgeable consumers of health insurance. Specifically, these Exchanges will serve as marketplaces in which individuals and businesses can seek out insurance at competitive rates. By providing easily accessible information and by allowing individuals and businesses to join together to make purchasing decisions, it is hoped that Heath Insurance Exchanges will heighten competition among insurers leading to lower costs.

Eliminating Barriers to Coverage

Some of the most common practices that exclude certain individuals from insurance coverage are prohibited by the PPACA. This aspect of the PPACA has already gone into effect. Among the prohibited practices are pre-existing condition exclusions and lifetime benefit limitations. The PPACA also eliminates the 'doughnut hole' for Medicare prescription drug coverage and allows young adults to stay on their parents' health care plans until they reach the age of 26.

III The Direct and (Perhaps) Indirect Effects of PPACA on Workers' Compensation[6]

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[5]For a more detailed description of the tax penalties see Jerry Geisel, Understanding Key Provisions In Federal Health Care Reform Legislation, Business Insurance (March 22, 2010 as updated July 9, 2010).

[6]Helpful commentary on the potential impact includes, National Council on Compensation Insurance, National Health Care Law: Implications for Workers Compensation Insurance (2010); IAIABC, What Will Federal Health Care Reform Mean for Workers'

The PPACA will have little direct but, perhaps, some indirect impact on workers' compensation. The reason why the PPACA's impact on workers' compensation is limited is straight forward: workers' compensation was not even a minor focus of the legislation. The phrase "workers' compensation" appears only a few times in this lengthy and complex bill. Greg Krohm, Executive Director of the International Association of Industrial Accident Boards and Commissions (IAIABC) observed that from the beginning "it was clear that workers' compensation was not an area that should get mixed into the reform process. Many feared a massive lobbying effort by the P&C industry to have workers' compensation removed from the discussion."[7] Since workers' compensation was not part of the legislative agenda, one should not expect the federal legislation to bring about immediate fundamental changes in how the workers' compensation system delivers medical care to injured workers. The discussion that follows is highly speculative and some of the potential effects cut in different directions. With these caveats in mind, the following have been identified as potential indirect effects

Black Lung Claims

One feature of the PPACA will have a direct substantive impact on federal black lung claims. The PPACA will reinstate two provisions repealed in 1981that facilitate recovery by coal miners who become disabled. The first provides for the automatic payment of survivor benefits upon the death of a coal miner who had previously been awarded a federal black lung claim. It will no longer be required that the survivors prove that the death was caused by pneumoconiosis. The second provision reinstates the rebuttable presumption that a miner is totally disabled due to pneumoconiosis upon proof of certain predicate facts (15 years of work in the mines; worker is totally disabled due to a respiratory condition; and an x-ray was negative for complicated pneumoconiosis).[8]

Record Keeping and Record Sharing

Section 10109 of the Act requires the Secretary of Health and Human Services to solicit

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Compensation in the U.S.? (2010); Gregory Krohm, Early Assessment of the Impacts of Federal Health Care Reform on Workers' Compensation, www.iaiabc.org (2010); Health Reform to Impact Workers' Comp, One Expert Says, P & C National Underwriter (http://www.property-casualty.com/News/2010) .

[7]IAIABC, What Will Federal Health Care Reform Mean for Workers' Compensation in the U.S.? (2010). Joe Paduda, a principal in Health Strategy Associates commented "[t]here's no interest on Capitol Hill in doing anything on workers' comp [concerning health care]...one senator said to me, 'it's hard enough to get this [health care legislation] as it is.'" Health Reform to Impact Workers' Comp, One Expert Says, P & C National Underwriter (http://www.property-casualty.com/News/2010) .

[8]For more details see NCCI, National Health Care Law: Implications for Workers Compensation Insurance (2010).

input from various groups in an effort to develop national reporting standards relating to health care services. The ultimate goal of these uniform standards is to "improve the operation of the healthcare system and reduce administrative costs." The Secretary is required to determine whether the reporting of health services delivered through workers' compensation should be part of these standards. If the Secretary decides that workers' compensation medical services should be part of the new national reporting standards, changes in state record keeping and reporting practices undoubtedly would be required.

Coordination of Benefits

An earlier version of the federal legislation included language that would require the establishment of standards for the coordination and subrogation of benefits and reimbursement of payments in cases involving individuals and multiple-plan coverage. It was thought that workers' compensation would be among the 'plans' that would be subject to these standards. Although that language was removed in the reconciliation process, federal standards regarding coordination, subrogation, and reimbursement may be taken up during the rulemaking process. If (a) federal standards regarding the coordination of various sources of medical benefits is enacted through the rulemaking process; and (b) if such rules include medical benefits paid through state workers' compensation, then the current pattern of state-level rules will be replaced. The extent to which federal standards will make a significant substantive change from the current law will depend, of course, on the precise rules adopted.[9]

Revision of Medicare Reimbursement Levels

The PPACA authorizes the Centers for Medicare and Medicaid Services (CMS) to modify Medicare reimbursement levels. Such modifications may effect those states that tie workers' compensation physician and hospital fee schedules to Medicare reimbursement rates. The extent of this potential impact depends on the precise changes CMS makes in the Medicare reimbursement rates and the extent to which states continue to adopt those rates for their workers' compensation fee schedules.[10]

Excise Taxes on Medical Devices

The PAACA imposes an excise tax some medical devices. To the extent that these devices are used in workers' compensation cases, costs will rise. Most observers characterize this impact as "modest."

Elimination of the Medicare "Donut Hole" for Prescription Drugs

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[9]See Christopher Gullen, Health Care Reform and Coordination of Benefits, 9 August 2009 EzineArticles.com

[10]NCCI, National Health Care Law: Implications for Workers Compensation Insurance (2010).

There is a coverage gap in prescription drug benefits available under the Medicare Part D. After a Medicare beneficiary surpasses the prescription drug coverage limit, the Medicare beneficiary is financially responsible for the entire cost of prescription drugs until the expense reaches the catastrophic coverage. The difference between the initial coverage limit and the catastrophic coverage threshold is informally known as the "donut hole." The PAACA eliminates this gap. In so doing, the legislation may increase the demand for prescription drugs which could, in turn, lead to an increase in price. To the extent this occurs and affects drugs prescribed for workers' compensation claimants, costs may increase.

Pilot Projects

The federal legislation authorizes funding of pilot programs that will explore various ways to reduce or contain costs. Some of these pilot projects may involve the development evidence-based protocols to be used in the workers' compensation setting.

Access to Providers

The main goal of the individual purchase mandates of the PAACA is to increase the number of Americans with health insurance. If these mandates succeed in that regard, there will be increased demand from patients for primary care. There is already concern within the heath care community about the diminishing number of physicians choosing primary care as their specialty. There is no plan in place that will increase the number of primary care providers to meet the increased demand for services. Some have speculated that this could produce access problems in the workers' compensation system, especially if reimbursement rates under private health plans are higher than those available under workers' compensation.

Seeking Treatment Under Workers' Compensation for Non-Work Related Injuries and Disease

The increased availability of general health insurance may diminish the need or temptation to seek medical care for conditions or diseases that are not genuinely work-related through the workers' compensation system. This is not considered to be a major cost driver however, so any cost-reduction effect would be minimal.

Expansion of Medicaid Coverage

The PAACA will increase the number of people with health insurance is by expanding Medicaid coverage, perhaps by as many as 20 million people. This could affect workers' compensation is several ways. First, such an expansion will likely place stress on already strapped state budgets. This pressure will make it more difficult for state workers' compensation systems to get the additional resources needed to increase benefits or improve administrative services.

Moreover, the expansion of Medicaid eligibility will make it another governmental payer

with which workers' compensation will have to coordinate. Perhaps the history of the workers' compensation-Medicare relationship[11] foreshadows what will happen with regard to Medicaid. That is, one might expect increased efforts to make sure that workers' compensation is the primary payer and reimbursement procedures are put in place to protect Medicaid. from paying medical expenses that are work-related. One important difference between Medicaid and Medicare should be noted. Medicare is administered by the federal government while Medicaid is administered on the state level. Consequently, it is not certain that the same federal protections enacted to protect Medicare will inevitably be enacted with regard to Medicaid.

Improved National Health

The most optimistic indirect impact on workers' compensation medical costs stems from the federal law making preventative health care more readily available to a greater number of people. It is hoped that this greater access to health care services will improve the overall health of the population. If so, the PAACA could indirectly contribute to the reduction of workers' compensation medical costs by reducing the negative impact that co-morbidities, such as obesity, smoking, and untreated diabetes, currently have on the treatment and cost of treatment of occupational injuries and disease. As one observer commented, PAACA may mean that "people long-term will be healthier. It will be easier to get them back to work. It will help reduce comp costs long-term because workers ar going to be healthier."[12]

The National Economy

Finally, there is heated disagreement on the impact that the PAACA will have on our nation's overall economic health. Proponents of the legislation believe that it will make a positive contribution to our long term economy. Opponents focus on immediate costs and believe it will stifle job creation and serve as a drag on economic recovery. As one noted observer comments, "the overall effects of health reform on the economy and job growth would affect the growth of covered employment, claims and payrolls. "[13]

IV Conclusion

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[11]For a more detailed discussion of interplay between Medicare and workers' compensation see David B. Torrey, Compromise Settlements Under State Workers' Compensation Acts, 16 Widner L. J. 199, 389-98 (2007); Bradford Peterson, Survey of Illinois Law: Summary of Medicare, Workers' Compensation and Set-Aside Trusts, 26 So. Ill. L. J. 713 (2002).

[12]Health Reform to Impact Workers' Comp, One Expert Says, P & C National Underwriter (http://www.property-casualty.com/News/2010) quoting Joe Paduda.

[13]IAIABC, What Will Federal Health Care Reform Mean for Workers' Compensation in the U.S.? (2010) quoting Gregory Krohm, Executive Director of IAIABC.

My bottom line conclusions are these: the PAACA will have little direct or immediate effect on state workers' compensation systems. However, there is the potential for considerable indirect affects, especially with regard to record keeping, coordination of benefits, and other details of administration. The actual impact of the recent federal legislation is difficult to predict. Some of the potential indirect effects may increase costs while others may moderate or even decrease costs. I will conclude with a quotation from an observer who is far more knowledgeable about the intricacies than I:

> "it is difficult to sort out the short and long term affect of the [PAACA]. Given the magnitude of the federal deficit, especially Medicare, and the fact that health expenditures affect nearly a fifth of the U.S.'s ecomonic output, there is a lot to worry about and hope for. Like the rest of population, workers' compensation may just have to 'wait, see, and respond accordingly as reform initiatives are implemented."[14]

[14]IAIABC, What Will Federal Health Care Reform Mean for Workers' Compensation in the U.S.? (2010) quoting Gregory Krohm, Executive Director of IAIABC.