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Client Alert

An overview of recent changes in Illinois law from the attorneys of Segal McCambridge

Important Recent Changes To Illinois Workers' Compensation Act

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This alert will highlight some of the important changes to the Illinois Workers' Compensation Act signed into law this summer.

The 2011 reforms reflect a legislative goal to improve the business climate in the State of Illinois. Most of the significant changes are pro-employer. For example, the amended Act reduces the Medical Fee Schedule rates by 30% and introduces an employer PPO plan [to be approved by the IL Department of Insurance] that is likely to limit an employer's liability for medical treatment. An employee's right to choose a medical provider has been limited. Additionally, all arbitrators have been terminated but will continue to serve until replaced.

Permanent partial disability to be determined by AMA Guidelines [New Section 8.1b]

For injuries occurring on or after September 1, 2011, permanent partial disability will be determined, in part, according to the most current edition of the American Medical Association's "Guide for the Evaluation of Permanent Impairment."

The AMA Guidelines will be used to define loss of range of motion, loss of strength, any atrophy or tissue mass reduction, or any other measurement that may establish the nature and extent of the impairment.

Determination of the level of permanent partial disability will be on the amount of impairment as defined by the AMA Guidelines. However, the Illinois Workers' Compensation Commission must also consider factors such as the occupation of the injured employee, the age of the employee at the time of the injury, the employee's future earning capacity, and evidence of disability corroborated by the treating medical records. In determining the level of disability the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

An Employee's Choice of Doctor Has Been Limited [New Section 8.1a & 8.a.4]

Sections 8.1a and 8.a.4 qualify an employee's right to have two separate choices of medical provider. The employer or its representative (*e.g.*, an insurance company) can now create a panel of medical providers and submit that panel to the Illinois Department of Insurance for approval. While the employee can opt out of the provider's network of medical providers, disincentives for doing so are built into the law, as described below.

After an injured employee notifies the employer of his injury or files a claim for workers' compensation, the employer must inform the employee in writing of his right to be treated by a physician of his or her choice from the preferred provider network. The Il-

linois Workers' Compensation Commission will create the forms necessary to comply with this section.

If the employee accepts the medical provider within the employer's network, the employee's decision constitutes the employee's first choice. Referrals within the network will not count as a choice. An employee will not be permitted to change from doctor to doctor even within the employer's network without a referral.

An employee may decline in writing to be treated within the employer's network. However, the employee's decision to decline participation constitutes a "choice," which effectively limits the employee to one choice of doctor. If the employer is not participating in a preferred provider program, the employee retains the right to choose two separate medical providers.

Hand Injury Claims Severely Limited [New Section 8.(e)9]

New Section 8(e)(9) reduces the number of weeks for a hand injury to a maximum of 190, down from 205. This amendment additionally limits carpal tunnel permanency to a maximum of 15% of the loss of use of a hand unless there is clear and convincing evidence of more disability, with an upper limit on recovery at 30% loss of use of the hand.

Employee Must Prove Causation [New Section 1(d)]

Section 1(d) requires an employee seeking recovery under the Illinois Workers' Compensation Act must prove that his or her accident "arose out of" and "in the course of" employment.

Wage Loss Differential Claims Limited [New Section8(d)1]

Amended Section 8(d)1, which provides for wage loss differentials for workers whose injury forces them into a lower-paying job, provides that an employee is entitled to his or her wage loss differential only until age 67 or five years from the date of any final award, whichever is longer.

Reimbursement to Medical Providers Significantly Limited [New Section 8.2]

Fee reductions to medical providers: New Section 8.2(a) rolls the fee schedule back by 30% for payments to medical providers. Additionally, medical implants will be reimbursed at 25% above the manufacture's invoice price, less rebates. Prescriptions that are filled outside a licensed pharmacy will be reimbursed at a rate that does not exceed the average wholesale price plus a $4.18 dispensing fee.

Beginning January 1, 2012, the geo-zips will be consolidated and there will be four geo-zips for non-hospital fee schedules and 14 geo-zips for hospital fee schedules, down from 29 geo zips before the amendment of the Illinois Workers' Compensation Act.

New Fee Billing Benefits Medical Providers: New Section 19(k)1 provides that medical providers must now be paid within 30 days after the employer has received the bill and appropriate records or face a 1% per month interest charge. The interest will be payable to the medical provider.

The amended provision additionally requires the creation of an electronic billing program, which will be overseen by the Illinois Director of Insurance.

Utilization Review Modified to Become More Employer-friendly: New Section 8.7 (a through j) deals with utilization review [UR]. UR is an employer-sought review of the employee's treatment to determine whether it is excessive. UR will now be based upon recognized treatment guidelines and evidence-based medicine. It will be overseen by the Illinois Department of Insurance. Upon receipt of written notice that an employer or its agent wishes to invoke the UR process, the medical provider is required to submit to the UR review and make reasonable efforts to provide timely and complete reports of clinical information needed to support a request for treatment. Medical providers who fail to comply might not be allowed to bill the employer or claimant for their services. An employer may only deny payment of medical services if an accredited UR finds that the scope of the treatment is excessive. When that happens, the employee must show by a preponderance of the evidence that the treatment in question is reasonably required.

The effective date for the UR changes is September 1, 2011.

Employers Now Have An "Intoxication Defense": Section 11 was changed to include an "intoxication defense." Employees will not be entitled to compensation if their intoxication was the proximate cause of the accidental injury or they were so intoxicated when the injury occurred that it constituted a departure from their employment.

If at the time of the injury the employee refuses to submit to testing of blood, breath, or urine, the refusal raises a rebuttable presumption that the employee was intoxicated and that the intoxication was the proximate cause of the employee's injury. The amended act specifies what blood tests are admissible and how that evidence is preserved. Additionally, "intoxication" may be caused by any substance, not just alcohol.

ADR Pilot Program [New Section 4b]

New Section 4b establishes a pilot program for alternative dispute resolution. Two labor unions and their respective employers will be allowed to establish a collective bargaining program. In order to participate, the employer's business must be related to construction, landscaping, roads, sewage, or other enumerated businesses. The labor union must be the exclusive representative of all the employer's employees and recognized or certified by the NLRB and approved by the Illinois Department of Insurance. The rights and obligations of the employer and employee under the ADR pilot program may not be greater or less than those provided for under the Illinois Workers' Compensation Act. Participants in the ADR pilot program can create their own panel of medical providers and rehabilitation specialists. All work injuries and procedures must he reported to the Illinois Workers' Compensation Commission.

Sweeping Changes to Improve Integrity of Arbitrators & Commissioners [New Section 14]

Termination and replacement of arbitrators: New Section 14 provides that all arbitrators were terminated at the close of business on July 1, 2011, though incumbents could continue until they are reappointed or their successors are appointed. The Governor of Illinois is empowered to make the appointments with advice and consent of the Illinois Senate.

Once chosen and confirmed, an arbitrator will serve for three years, though some initial appointments are shorter so terms can be staggered. The terminations will be in blocks of 12 and the first set of appointees will see their term expire July 1, 2012. The second set of terms expires July 1, 2013. The final set of arbitrators' terms will expire on July 1, 2014.

A qualified arbitrator must be an attorney, though current arbitrators who are not attorneys are "grandfathered in" for continued service and reappointment. At the end of the arbitrator's term, the Chairman of the Illinois Workers' Compensation Commission is required to evaluate the arbitrator's performance and recommend whether or not reappointment to a second or subsequent term by the full Commission is appropriate.

Arbitrators per hearing site: New Section 14 provides that "[t]he Commission shall assign no fewer than three arbitrators to each hearing site. The Commission shall establish a procedure to ensure that the arbitrators assigned to each hearing site are assigned cases on a random basis. No arbitrator shall hear cases in any county other than Cook County for more than two years in each three-year term." To accommodate this mandate, the commission must consolidate the hearing sites outside of Cook County.

CLE requirement: Under new sub-sections h, j, and k of Sections 13 and 14, arbitrators and commissioners must undergo 20 hours of continuing legal education that include ethics, use of the American Medical Association's Guide to the Evaluation of Permanent Impairment, fraud and utilization review, and the substantive and procedural aspects of coal worker's pneumoconiosis (black lung) cases. Each commissioner must take 20 hours of CLE every two years in office.

New Fraud Prevention Provisions

Penalties and analytics: New Section 25.5 governs fraud and applies to employers, employees and medical providers. It makes intentionally presenting a medical bill for payment when there has been no treatment a Class A misdemeanor if it is less than

$300. If more than $300 and less than $1,000 it is a Class III felony. If more than $10,000, it is a Class II felony. If more than $100,000, it is a Class I felony.

The amended provision requires that, before January 1, 2012, the Fraud and Insurance Noncompliance Unit must implement a system using techniques such as predictive modeling, data mining, social network analysis, and scoring algorithms to detect and prevent fraud, waste and abuse. They must report to the chairman of the Illinois Workers' Compensation Commission and others on an annual basis.

Statistics: New Section 29.2 requires the Illinois Department of Insurance to annually report to the Chairman of the Illinois Workers' Compensation Commission and legislative leaders the gross amount of premiums collected by workers' compensation carriers in Illinois, the number of insurance companies engaged in Illinois in workers' compensation insurance, the total number of insured participants in the Illinois workers' compensation assigned risk pool, the size of the pool and the proportion of the total Illinois workers' compensation insurance market, the premium rate for workers' compensation insurance in Illinois, and numerous other claims and other statistics.

Gift ban: A ban on gifts to Arbitrators and other Commission employees of more than $75 is set forth in new Section 16(b) and applies to both respondent and petitioner attorneys.

Claims by Commission Employees: New Section 18.1 provides that the cases of all current and former Commission employees with work injuries pending before the Commission be assigned to a certified independent arbitrator not employed by the Commission.

Segal McCambridge is a litigation defense firm with experience in handling workers' compensation claims. Should you have any questions concerning this aspect of the law, please do not hesitate to contact us.

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