

New York Workers' Compensation Law Changes: Implications for Employers

New York's 2017 budget includes the most significant changes to the state's workers' compensation system since 2007. Legislation passed in 2007 has resulted in an approximate 20% cost increase, with the potential for greater cost increases as claims mature. The new legislation — signed into law on April 10 — could reduce costs, but its full effect will heavily depend on how the New York State Workers' Compensation Board (the Board) implements and administers the mandated changes.

As employers familiarize themselves with the new law, it is important that they are aware of its major changes and the potential impact on workers' compensation costs in New York.

ATTACHMENT TO THE LABOR MARKET DEFENSE ELIMINATED

Under the new law, a claimant is no longer required to remain attached to the labor market upon classification with a permanent partial disability (PPD); this applies to past and current claims. The insurer's or employer's defense of attachment to the labor market is limited to temporary rates prior to maximum medical improvement (MMI)/classification. The law eliminates the ability of an insurer or employer to reopen PPD classified cases based on a claimant's failure to demonstrate an attachment to the labor market.

Once a claimant is classified, the established statutory cap is essentially guaranteed.

Potential Claim Impact: In instances where claimants have been classified, insurers and employers will no longer be able to raise the "attachment to the labor market" defense, including during settlement negotiations. The potential impact on overall costs is expected to be small.

INSURER CREDIT FOR TEMPORARY DISABILITY ON PPD CAPS

Section 15(3)(w) of the state's workers' compensation law is amended to provide the insurer or employer with a credit for prior payments against the statutory cap when permanent partial disability is determined. This rule applies to all injuries with accident or disability dates after April 9, 2017.

The credit for prior payments applies only to benefits paid beyond 130 weeks from the date of accident or disablement. The insurer shall not receive a credit for benefit weeks prior to a finding that the claimant has reached MMI when permanency is at issue, and where all of the following are true:

- The claimant has produced medical evidence indicating that he or she is not at MMI.
- The insurer has had an opportunity to rebut this evidence with its own independent medical exam (IME).
- The New York State Workers' Compensation Board has found the claimant is not at MMI.

Once MMI has been reached, the insurer or employer shall receive

credit for any weeks of temporary disability paid to the claimant after such finding of PPD against the statutory cap.

Potential Claim Impact: This new law applies to claims with accident or disablement dates after April 9, 2017. It appears that this element of the new law creates a presumption that the claimant has reached MMI after 130 weeks of temporary benefit payments. For employers, it will be crucial to accurately track the number of weeks of temporary disability paid to a claimant to avoid overpayment and to receive full credit for all payments.

Under the new law, a claimant must also be at MMI in order for the credit to be applied. This is to reduce the number of claims on extended duration of temporary disability. These extended duration claims evolved into a costly issue following passage of the 2007 legislation. In an effort to avoid “starting the clock” on those duration limits, claimants have been extending the duration of their temporary disability claims.

If the 130-week limit is diligently enforced by the Board with reasonable definitions of what constitutes MMI for application of the limit, this element of the new law could generate measureable cost savings. If not, this element of the law will have little or no impact on costs.

EXTREME HARDSHIP REDETERMINATION

The new law further opens the extreme hardship loophole on PPD cases by lowering the threshold for an extreme hardship redetermination application from “greater than 80%” loss of wage earning capacity (LWEC) to “greater than 75%.” In cases where the LWEC is greater than 75%, a

claimant may request — within the year prior to the scheduled exhaustion of indemnity benefits — that the Board reclassify the claimant to permanent total disability or total industrial disability, where such finding would result in lifetime indemnity benefits. Section 23 of the state’s workers’ compensation law has also been changed to recognize a claimant’s right to a full Board review in cases where the Board panel reduced the claimant’s LWEC to 75% or lower.

Potential Claim Impact: The changes to the extreme hardship thresholds are perhaps the most concerning portions of the 2017 legislation, particularly because the impact of the previous “greater than 80%” threshold established under the 2007 legislation is not yet known.

Anecdotal evidence suggests that the number of hardship eligible claims is low, with few actual hardship awards. However, the low number may be due to the fact that post-2007 claims are not yet mature enough to test the hardship clause. Individuals with sufficiently serious injuries to warrant an 80% LWEC disability rating will likely receive temporary disability benefit payments for at least several years. The duration limit at 80% disability is 425 weeks, or eight years. This means that claims with dates of loss in 2007 only became eligible for treatment under the extreme hardship provisions in 2015.

Additionally, the number of eligible hardship claims from 2007 may be low because the maximum weekly benefit in New York, or two-thirds of the state’s average weekly wage, increased over the 2007-2010 period from \$500 to \$740. As the maximum weekly benefit increased, claimants likely became more willing to remain on disability for longer periods of

time, which in turn drives an increase in claims eligible for extreme hardship treatment.

All of this means that the hardship threshold was reduced from 80% to 75% before the true impact of the original 80% level could be measured and understood.

As with the 130-week cap, if the Board establishes strong eligibility requirements for financial hardship and strictly enforces those requirements, it is possible that the impact of the extreme hardship classifications will be minimal. However, there is risk for employers: If a substantial number of claimants apply for and are rewarded hardship permanent total disability awards, workers’ compensation costs in New York are likely to increase materially.

NO AGREEMENT ON SCHEDULE LOSS OF USE REFORM

It would appear that the New York legislature did not reach an agreement on schedule loss of use (SLU) reform for the 2017 budget. Instead, the 2017 legislation requires the Board chair — in consultation with representatives of labor and business — to develop new permanency impairment guidelines concerning SLU findings by September 1, 2017, for implementation on January 1, 2018.

Should the Board chair fail to develop these guidelines, the new law requires the Board chair to implement either the September 1 proposed guidelines or guidelines created by a “consultant to the board,” submitted to stakeholders, and voted on by the Board at its December 29, 2017, meeting. Should the Board be unable to reach a consensus at that meeting, the Board chair will be

allowed to select the new guidelines, which will stay in effect for 90 days or until new guidelines are implemented. The legislation further provides that the SLU portion of the current 2012 guidelines will no longer be in effect after January 1, 2018.

Potential Claim Impact: The high cost of scheduled loss of use awards in New York is primarily due to the 2007 legislation, which raised the maximum weekly benefit from \$400 to two-thirds of the state's current average weekly wage, or \$864. The guidelines, if implemented, will affect the number of weeks of benefits awarded, and could act to reduce costs.

PRESCRIPTION DRUG FORMULARY

Under the new law, the Board chair is required to establish a comprehensive prescription drug formulary on or before December 31, 2017. The prescription formulary will include a two-tiered list of high quality, cost effective medications that are pre-approved to be prescribed and dispensed, as well as additional non-preferred drugs that can be prescribed with prior approval. The formulary will include a strategy for prescription reimbursement, drug rebates, drug utilization review, and limits on compound medications. The new law also requires the Board to promulgate regulations to permit an interested party to submit a request to the medical director of the Board to alter or amend the formulary to consider changing the status of a drug from non-preferred to preferred.

Potential Claim Impact: A 2014 study Workers Compensation Research Institute suggests that a formulary in New York could reduce prescription drug costs by 29%. Any changes that can be made to help

counteract prescription drug abuse and to reduce claim costs will benefit employers. However, it remains to be seen how New York's formulary will be structured and what results it will bring.

PENALTIES AND CLAIMANTS' RIGHTS TO HEARINGS

In cases where an injured worker has made a claim for compensation supported by medical evidence and where the insurer has not controverted the claim but has not begun payments, the Board will now grant a hearing to the claimant within 45 days of request. The new law gives the Board the power to assess an aggregate penalty to any insurer or self-insured employer that fails to meet the promulgated standard, with such penalties to be issued administratively with notice to the insurer or employer. The Board is empowered to negotiate and resolve these penalties with payers and to establish the method of review or appeal of such penalty, which may only take place administratively, outside of the context of a hearing.

Potential Claim Impact: Insurers will need to ensure that if a claim is accepted and the claimant is losing time from work, lost time benefits are paid in a timely manner. If benefits are not paid in a timely manner, the Board can assess a penalty to the insurer and/or employer.

INDEPENDENT MEDICAL EXAMINATIONS

The new law directs the Board chair to conduct a "thorough study" of the use of IMEs in New York state in 2018. The Board chair is required to present

a report to an advisory committee consisting of representatives from organized labor, business, insurers, self-insured employers, medical providers, and other workers' compensation system stakeholders.

By December 31, 2019, the advisory committee is required to present detailed recommendations, including administrative improvements and regulatory and statutory proposals, to the governor, Assembly speaker, and Senate majority leader. The committee's report will consider the feasibility of new methods of assigning IMEs. Such improvements and proposals may include rotating providers or panels, establishing statewide networks, or other arrangements.

Potential Claim Impact: It remains to be seen what changes, if any, are made to the IME process. Any changes will likely not be implemented for several years.

DEFENSES LIMITED IN FIRST RESPONDER STRESS CLAIMS

In stress claims involving a variety of first responders — including police officers and firefighters — employers were previously allowed to argue that the stress was not greater than that which usually occurs in the normal work environment. The new law eliminates this defense.

Potential Claim Impact: The changes under the new law will likely make it easier for first responders to make mental health injury claims precipitated by workplace stress.

MANAGING WORKERS' COMPENSATION RISKS IN NEW YORK

The changes to New York state's workers' compensation law will affect how claims are handled both in the near- and long-term. While the intent of the legislation is to reduce costs, the actual cost impact will depend on how the New York State Workers' Compensation Board acts to implement specific elements of the legislation. Employers should monitor how these changes are implemented and discuss their potential impacts with their insurance and legal advisors.

ABOUT THIS BRIEFING

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