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What's New In Our Industry Florida

I. Legislative

The following bills having workers' compensation implications been pre-filed for consideration by the 2021 Legislative Session. Their status will be from time to time reported. Although some of the bills may not have direct workers' compensation implications, it is felt that the workers' compensation industry will in some way be affected. By way of background, approximately 70% of total benefits paid in the workers' compensation system relate to medical care. One can only imagine what effect some of the bills filed will have on the enormity of medical expenses on the total medical payout. The Legislative Session is set to begin on March 2, 2021, with committee meetings scheduled up to that time.

Senate Bill 820 related to the Employee Leasing (PEO) industry ensuring that leased employees are properly insured by the carrier for the leasing company if the client company fails to secure and maintain separate workers' compensation coverage on such individuals. A person is considered an employee of the PEO upon the earliest of the following:

- a. The hiring of the leased employee by the client company;
- b. The commencement of work for the client company by such person;
- c. The hiring of such person directly by the employee leasing company. The failure of the client company to report a leased employee to a PEO is not a basis for the denial of workers' compensation benefits.

The bill also clarifies procedures for collecting appropriate premiums for client companies and reporting losses.

Senate Bill 846, Companion House Bill 561 relates to the recovery of past medical expenses in personal injury and wrongful death actions. The bill adds workers' compensation to the definition of "health care coverage." In attempting to recover past medical expenses where "health care coverage" has been paid (workers' compensation), the actual paid amount can be claimed. Where past medical expenses are unpaid, the amount recoverable is limited to evidence of the amount necessary to satisfy the charge for the medical procedures provided. The bill establishes procedures for determining how to establish the amount necessary to satisfy such charges. In determining the amount necessary to satisfy such a charge, reference is made to the provisions of the Workers' Compensation Statute.

Senate Bill 742. In determining rates payable for workers' compensation and employer liability insurance coverages, past loss experience and prospective loss experience within and without the state is utilized. If such data is missing due to the insolvency of an insurer, prior reported data and all other relevant information may be used to assess the impact on rates.

Senate Bill 660 allows telehealth providers to use telehealth to prescribe controlled substances. See subsequent discussion on data collected by the Division showing amounts paid for telemedicine.

Senate Bill 864 allows for the provision of telehealth services through audio only telephone calls. Deletes from statutory provisions that the ultimate authority over the diagnosis and care of a patient is a health care professional licensed in this state.

House Bill 431, Companion Senate Bill 894 authorizes physician assistants to practice medicine in collaboration with physicians and other health care practitioners. This bill will allow for physician assistants to determine the date of MMI as defined in Section 440.02, Florida Statutes. Physician assistants will be able to prescribe physical, occupational and special therapy orders and durable medical equipment. The bill establishes new training and certification requirements for physician assistant's licensure. An autonomous practice by a physician assistant in certain medical specialties including primary care practices will be permitted. Autonomous physician assistants may directly bill and recover payments from insurance companies and may be permitted to prescribe and dispense medications.

Senate Bill 390 allows for market conduct examinations of pharmacy benefit managers. Current law allows for market conduct examinations by carriers as defined in Section 440.02, Florida Statutes. The examination shall be for the purpose of determining compliance with the provisions of Chapter 440. Restrictions are placed on how the audit is to be performed. A new provision provides appellate review rights to a pharmacy if there is a disagreement with the results of the audit.

Senate Bill 352, Companion House Bill 245. This bill would provide that the unregulated practice of massage therapy poses a danger to the public. Massage therapy is a therapeutic health care practice and includes over-the-counter topical agents or a topical agent prescribed by a health care practitioner and includes massage therapy assessments for compensation. Massage therapy assessments also includes the determination of the cause of massage therapy treatments.

House Bill 343, Companion Senate Bill 710 Recreational marijuana is permitted for persons 21 years of age or older. Such marijuana may be delivered by one person over 21 years of age without consideration to another person 21 years or older. For definition purposes, marijuana is described as marijuana products that contain a total of 2000 mg. or less of tetrahydrocannabinol and a quantity of 2.5 ounces or less of marijuana for smoking. A person 21 years of age or older may possess marijuana that contains a total of 2000 mg. or less of tetrahydrocannabinol or 4.0 ounces or less in a form for smoking. This bill would have retroactive effect where an individual was convicted of possession of cannabis before January 1, 2022. Procedures are created for expungement of prior record/conviction of cannabis with exceptions. If orders of expungement have been entered, the individual may lawfully deny or fail to acknowledge arrests and convictions covered by the expunged orders. Exceptions are provided for. The individual that obtained an

expungement order cannot be deemed to have given a false statement for reasons of his/her failure to acknowledge an expunged criminal history record.

In regards to medical marijuana treatment centers that allows for physicians to prescribe medical marijuana for less than three 70-day supply limits or less than six 35-day supply limits of marijuana in a form for smoking. Exceptions are provided for. This bill adopts new standards for qualifying as a Medical Marijuana Treatment Center including the transportation, storage, delivery of marijuana, growing marijuana and dispensing and processing of medical marijuana products.

House Bill 335. Employers cannot take adverse personnel actions against an employee who is a qualified patient using medical marijuana. However, if the employer establishes by a preponderance of the evidence that the lawful use of medical marijuana is impairing the employee's ability to perform his or her job responsibilities, such adverse personnel actions can be taken. Impaired ability to perform job responsibilities occur if the employee displays specific "articulable symptoms" while working which decreases or lessens the performance of his or her job tasks. This bill establishes procedures for adverse employment actions. Unlawful adverse employment actions may properly be the subject of civil causes of action that must be filed within 180 days after an alleged violation. Damages would include compensation for lost wages, benefits and remuneration plus attorney's fees and costs. This law would not prohibit an employer from taking adverse personnel actions against an employee for the possession or use of a controlled substance during normal business hours or require the employer to commit any act that would cause the employer to violate a federal law or that would cause an employer to lose a federal contract or federal funding; require a government medical assistance program or private health insurer to reimburse a person for costs associated with the use of medical marijuana or require an employer to modify the job or working conditions of a person who engages in the use of medical marijuana based on the reasonable business purposes of the employer. The employer must attempt to make reasonable accommodations for medical needs of an employee who engages in the use of medical marijuana unless the employer can demonstrate that the accommodation would pose a threat or harm or danger to person or property or create undue hardship on the employer or prohibit the employee from fulfilling his/her job responsibilities. A law enforcement agency could adopt policies and procedures that preclude an employee from engaging in the use of medical marijuana.

Senate Bill 72, Companion House Bill 7. These bills provide for employer immunity from civil causes of action for Covid related claims. Civil immunity is granted to companies that have made a good faith effort to substantially comply with authoritative or government-issued health standards for protection against Covid. If a good faith effort was made, the defendant is immune from civil liability. If there was no good faith effort, there can be a basis for such a claim if at least gross negligence is proven by clear and convincing evidence. A civil cause of action for a Covid related claim must be filed or commenced within one year after the cause of action accrues.

II. Administrative/Executive

1. Florida Division of Workers' Compensation 2020 Covid-19 Report

For the period January 2020 to December 2020, the Division of Workers' Compensation reported 29,400 Covid-19 claims requiring the payout of \$55,408,298.00. 31.5% of all indemnity claims were Covid related. Covid-19 paid benefits constituted 7.6% of all claims paid under the workers' compensation system. As would be expected, most of the Covid-19 claim counts came from Dade and Broward counties. Most of the claims came from "public administration business" (which includes first responders) and education and health services. Female employees accounted for most of the claims with the average age of claimants being from 30 to 39 years. There have been a total of 110 petitions for benefits filed. Of those petitions, 43 are compensable claims and 67 have been denied. The percentage of petitions for benefits filed for all Covid-19 claims is 0.37%.

2. Telemedicine Medical Care

According to the Division of Workers' Compensation, telemedicine has created a significant increase in the total amounts payable under the workers' compensation system. In 2019, the total paid for telemedicine was \$209,147.00. That number increased to \$6,269,443.00 in 2020. Most of the telemedicine payouts went to medical doctors. As referenced above, physician assistants have been the subject of several bills that have been filed in the Legislature. Data showed that \$76,481.00 in 2020 was paid for physician assistant services. One would expect that number would go up should proposed legislation be adopted.

3. Report to the Three Member Panel Regarding Resolution of Medical Reimbursement Disputes

The Florida Department of Financial Services, Division of Workers' Compensation, Medical Services Section recently submitted its report to the Three Member Panel regarding the resolution of medical reimbursement disputes and actions pursuant to paragraph 440.13(12)(e), Florida Statutes. During FY-2019-2020, 3.6 million medical bills were filed with the Division and of these 3.6 million medical bills, the Medical Services Section received 4,607 Reimbursement Disputes. A total of 4,087 petitions were closed by the Medical Services Section. A significant amount of attention has been given to establishing new procedures for adjudicating such disputes. Changes in these procedures have been previously outlined and are still the subject of debate until finally being processed as an adopted rule pursuant to the Administrative Procedures Act.

4. Provider Fee Schedules

Recommended Provider Fee Schedules including hospital charges have been adopted by the Division but are now subject to the rulemaking process as provided for in Chapter 120, Florida Statutes. Medical Provider Reimbursement Manuals must be approved by the Legislature. The Division recommends and will be filing legislative proposals to exempt the reimbursement manuals from legislative ratification. A recommended hospital fee schedule, according to costs predictions by NCCI, will show a reduction in overall benefits to be payable and therefore there is no need for legislative ratification. There has been significant debate as to whether these recommended changes would in fact cause associated costs to go down.