

## New CMS Model Language Leaves Critical Questions Unanswered

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*Medicare Secondary Payer Mandatory Reporting Requirements Applicable to All Liability, No-Fault and Workers' Compensation Insurers*

On August 31, 2009, the [Centers for Medicare & Medicaid Services](#) ("CMS") posted an "ALERT" entitled "[Compliance Regarding Obtaining Individual HICNs and/or SSNs](#)" and an accompanying [Model Language Form](#) (the "Model Form") to the CMS web site that is intended to provide liability, no-fault and workers' compensation insurers (collectively, "NGHP Insurers") with guidance from the agency concerning how such entities may collect the personal information from injured claimants that each NGHP Insurer, in its capacity as a Responsible Reporting Entity ("RRE"), is required to begin reporting to CMS pursuant to [The Medicare, Medicaid and SCHIP Extension Act of 2007](#) (the "Act").

The Act requires all NGHP Insurers to file specified data electronically with CMS with respect to all claims involving an injury to a Medicare beneficiary where the judgment, settlement, award or other payment date is January 1, 2010, or subsequent. Such NGHP Insurers are likewise obligated by the Act to report claims for which the insurer possesses an ongoing responsibility to pay for medical services ("ORM"), existing as of July 1, 2009, and subsequent, even if the date of the initial acceptance of ORM occurred prior to July 1, 2009. Please note that each NGHP Insurer has until September 30, 2009, to complete its registration with CMS as an RRE pursuant to the Act.

The newly published ALERT states that the Model Form is intended to create a safe harbor for NGHP Insurers reporting under the Act in that

CMS will consider the reporting entity compliant for purposes of its next Section 111 file submission if . . . a signed copy of the . . . [Model Form] is obtained (even if the individual is later discovered to be a Medicare beneficiary . . . .

### **Problematic Aspects**

- The ALERT does not address the situation (likely to be fairly common) when an injured claimant simply declines to return the Model Form to the reporting NGHP Insurer. The clear implication of the ALERT is that the safe harbor would not apply in such a scenario, thus creating a compliance risk for the reporting NGHP Insurer.
- The ALERT requires the NGHP Insurer to continue to obtain an additional executed Model Form from each ORM claimant at least once every 12 months to ensure the continued applicability of the safe harbor to such ORM claim. Again, this places the reporting NGHP Insurer in the uncomfortable position of requiring performance by the claimant to maintain its safe harbor status.

We note that these issues, as well as other aspects of the Act's reporting requirements, are complex and present difficult interpretative issues.

For further information regarding NGHP Insurers' obligations under the Act, please contact [Dennis C. Quinn](mailto:dquinn@bargerwolen.com) at 212-655-3878 or [dquinn@bargerwolen.com](mailto:dquinn@bargerwolen.com).