

115TH CONGRESS
2D SESSION

S. 3079

To amend title XVIII of the Social Security Act to provide for the application of Medicare secondary payer rules to certain workers' compensation settlement agreements and qualified Medicare set-aside provisions.

IN THE SENATE OF THE UNITED STATES

JUNE 18, 2018

Mr. PORTMAN (for himself and Mr. NELSON) introduced the following bill;
which was read twice and referred to the Committee on Finance

A BILL

To amend title XVIII of the Social Security Act to provide for the application of Medicare secondary payer rules to certain workers' compensation settlement agreements and qualified Medicare set-aside provisions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Medicare Secondary
5 Payer and Workers’ Compensation Settlement Agree-
6 ments Act of 2018”.

1 **SEC. 2. APPLICATION OF MEDICARE SECONDARY PAYER**
 2 **RULES TO CERTAIN WORKERS' COMPENSA-**
 3 **TION SETTLEMENT AGREEMENTS.**

4 (a) SECONDARY PAYER PROVISIONS FOR WORKERS'
 5 COMPENSATION SETTLEMENT AGREEMENTS.—Section
 6 1862 of the Social Security Act (42 U.S.C. 1395y) is
 7 amended—

8 (1) in subsection (b)(2)(A)(ii), by inserting
 9 “subject to subsection (p),” after “(ii)”; and

10 (2) by adding at the end the following new sub-
 11 section:

12 “(p) DEFINITIONS.—For purposes of this subsection
 13 and subsection (q):

14 “(1) COMPROMISE AGREEMENT.—The term
 15 ‘compromise agreement’ means a workers’ com-
 16 pensation settlement agreement that—

17 “(A) applies to a workers’ compensation
 18 claim that is denied or contested, in whole or in
 19 part, by a workers’ compensation payer involved
 20 under the workers’ compensation law or plan
 21 applicable to the jurisdiction in which the
 22 agreement has been settled; and

23 “(B) does not provide for a payment of the
 24 full amount of benefits sought or that may be
 25 payable under the workers’ compensation claim.

1 “(2) WORKERS’ COMPENSATION CLAIMANT.—

2 The term ‘workers’ compensation claimant’ means a
3 worker who—

4 “(A) is or may be covered under a workers’
5 compensation law or plan; and

6 “(B) submits a claim or accepts benefits
7 under such law or plan for a work-related in-
8 jury or illness.

9 “(3) WORKERS’ COMPENSATION LAW OR
10 PLAN.—

11 “(A) IN GENERAL.—The term ‘workers’
12 compensation law or plan’ means a law or pro-
13 gram administered by a State or the United
14 States to provide compensation to workers for
15 a work-related injury or illness (or for disability
16 or death caused by such an injury or illness),
17 including the Longshore and Harbor Workers’
18 Compensation Act (33 U.S.C. 901–944, 948–
19 950), chapter 81 of title 5, United States Code
20 (known as the Federal Employees Compensa-
21 tion Act), the Black Lung Benefits Act (30
22 U.S.C. 931 et seq.), and part C of title 4 of the
23 Federal Coal Mine and Safety Act (30 U.S.C.
24 901 et seq.), but not including the Act of April
25 22, 1908 (45 U.S.C. 51 et seq.) (popularly re-

1 ferred to as the Federal Employer’s Liability
2 Act).

3 “(B) INCLUSION OF SIMILAR COMPENSA-
4 TION PLAN.—Such term includes a similar com-
5 pensation plan established by an employer that
6 is funded by such employer or the insurance
7 carrier of such employer to provide compensa-
8 tion to a worker of such employer for a work-
9 related injury or illness.

10 “(4) WORKERS’ COMPENSATION PAYER.—The
11 term ‘workers’ compensation payer’ means, with re-
12 spect to a workers’ compensation law or plan, a
13 workers’ compensation insurer, self-insurer, em-
14 ployer, individual, or any other entity that is or may
15 be liable for the payment of benefits to a workers’
16 compensation claimant pursuant to the workers’
17 compensation law or plan.

18 “(5) WORKERS’ COMPENSATION SETTLEMENT
19 AGREEMENT.—The term ‘workers’ compensation set-
20 tlement agreement’ means an agreement, between a
21 claimant and one or more workers’ compensation
22 payers which—

23 “(A) forecloses the possibility of future
24 payment of some or all workers’ compensation
25 benefits involved; and

1 “(B)(i) compensates the claimant for a
 2 work-related injury or illness as provided for by
 3 a workers’ compensation law or plan; or

4 “(ii) eliminates cause for litigation involv-
 5 ing issues in dispute between the claimant and
 6 payer.”.

7 (b) SATISFACTION OF SECONDARY PAYER OBLIGA-
 8 TIONS.—Section 1862 of the Social Security Act (42
 9 U.S.C. 1395y), as amended by subsection (a), is further
 10 amended by adding at the end the following new sub-
 11 section:

12 “(q) TREATMENT OF MEDICARE SET-ASIDES UNDER
 13 WORKERS’ COMPENSATION SETTLEMENT AGREE-
 14 MENTS.—

15 “(1) SATISFACTION OF SECONDARY PAYER OB-
 16 LIGATIONS.—

17 “(A) FULL SATISFACTION OF CLAIM OBLI-
 18 GATIONS.—

19 “(i) IN GENERAL.—If a workers’ com-
 20 pensation settlement agreement, related to
 21 a claim of a workers’ compensation claim-
 22 ant, includes a Medicare set-aside (as de-
 23 fined in subparagraph (B)(i), such set-
 24 aside shall satisfy any obligation with re-
 25 spect to payments reasonably expected to

1 be made under subsection (b)(2)(A)(ii)
 2 with respect to such claim.

3 “(ii) RULE OF CONSTRUCTION.—
 4 Nothing in this section shall be construed
 5 as requiring the submission of a Medicare
 6 set-aside to the Secretary.

7 “(B) MEDICARE SET-ASIDE AND MEDI-
 8 CARE SET-ASIDE AMOUNT DEFINED.—For pur-
 9 poses of this subsection:

10 “(i) MEDICARE SET-ASIDE.—The
 11 term ‘Medicare set-aside’ means, with re-
 12 spect to a workers’ compensation settle-
 13 ment agreement, a provision in the agree-
 14 ment that provides for a payment of a
 15 lump sum, annuity, a combination of a
 16 lump sum and an annuity, or other
 17 amount that is in full satisfaction of the
 18 obligation described in subparagraph (A)
 19 for items and services that the workers’
 20 compensation claimant under the agree-
 21 ment received or is reasonably expected to
 22 receive under the applicable workers’ com-
 23 pensation law.

24 “(ii) MEDICARE SET-ASIDE
 25 AMOUNT.—The term ‘Medicare set-aside

1 amount' means, with respect to a Medicare
 2 set-aside, the actual dollar amount pro-
 3 vided for in clause (i).

4 “(2) MEDICARE SET-ASIDE.—

5 “(A) SATISFACTION OF MEDICARE SET-
 6 ASIDE.—For purposes of this subsection, a
 7 Medicare set-aside meets Medicare secondary
 8 payer obligations if the Medicare set-aside
 9 amount reasonably takes into account the full
 10 payment obligation described in paragraph
 11 (1)(A), while meeting the requirements of sub-
 12 paragraphs (B) and (C) and is determined
 13 based on the following:

14 “(i) The illness or injury giving rise to
 15 the workers' compensation claim involved.

16 “(ii) The age and life expectancy of
 17 the claimant involved.

18 “(iii) The reasonableness of and ne-
 19 cessity for future medical expenses for
 20 treatment of the illness or injury involved.

21 “(iv) The duration of and limitation
 22 on benefits payable under the workers'
 23 compensation law or plan involved.

1 “(v) The regulations and case law rel-
 2 evant to the State workers’ compensation
 3 law or plan involved.

4 “(B) ITEMS AND SERVICES INCLUDED.—A
 5 Medicare set-aside—

6 “(i) shall include payment for items
 7 and services that are covered and otherwise
 8 payable under this title as of the effective
 9 date of the workers’ compensation settle-
 10 ment agreement and that are covered by
 11 the workers’ compensation law or plan;
 12 and

13 “(ii) is not required to provide for
 14 payment for items and services that are
 15 not described in clause (i).

16 “(C) PAYMENT REQUIREMENTS.—

17 “(i) REQUIRED APPLICATION OF
 18 WORKERS’ COMPENSATION LAW AND FEE
 19 SCHEDULE.—

20 “(I) IN GENERAL.—Except in the
 21 case of an optional direct payment of
 22 a Medicare set-aside made under
 23 paragraph (5)(A), the set-aside
 24 amount shall be based upon the pay-
 25 ment amount for items and services

1 under the workers' compensation law
2 or plan and applicable fee schedule
3 (effective as of the date of the agree-
4 ment).

5 “(II) WORKERS’ COMPENSATION
6 FEE SCHEDULE DEFINED.—For pur-
7 poses of this subsection, the term
8 ‘workers’ compensation fee schedule’
9 means, with respect to a workers’
10 compensation law or plan of a State
11 or a similar plan applicable in a State,
12 the schedule of payment amounts the
13 State has established to pay providers
14 for items and services furnished to
15 workers who incur a work-related in-
16 jury or illness as defined under such
17 law or plan (or in the absence of such
18 a schedule, the applicable medical re-
19 imbursement rate under such law or
20 plan).

21 “(ii) OPTIONAL PROPORTIONAL AD-
22 JUSTMENT FOR COMPROMISE SETTLEMENT
23 AGREEMENTS.—In the case of a com-
24 promise settlement agreement, a claimant
25 or workers’ compensation payer who is

1 party to the agreement may elect to cal-
 2 culate the Medicare set-aside amount of
 3 the agreement by applying a percentage re-
 4 duction to the Medicare set-aside amount
 5 for the total settlement amount that could
 6 have been payable under the applicable
 7 workers' compensation law or similar plan
 8 involved had the denied, disputed, or con-
 9 tested portion of the claim not been subject
 10 to a compromise agreement. The percent-
 11 age reduction shall be equal to the denied,
 12 disputed, or contested percentage of such
 13 total settlement. Such election may be
 14 made by a party to the agreement only
 15 with the written consent of the other party
 16 or parties to the agreement.

17 “(3) OPTIONAL PROCESS FOR APPROVAL OF
 18 MEDICARE SET-ASIDES.—

19 “(A) OPTIONAL PRIOR APPROVAL BY SEC-
 20 RETARY.—A party to a workers' compensation
 21 settlement agreement that includes a Medicare
 22 set-aside may submit to the Secretary the Medi-
 23 care set-aside amount for approval.

24 “(B) NOTICE OF DETERMINATION OF AP-
 25 PROVAL OR DISAPPROVAL.—Not later than 60

1 days after the date on which the Secretary re-
2 ceives a submission under subparagraph (A),
3 the Secretary shall notify in writing the parties
4 to the workers' compensation settlement agree-
5 ment of the determination of approval or dis-
6 approval. If the determination disapproves such
7 submission the Secretary shall include with
8 such notification the specific reasons for the
9 disapproval.

10 “(4) APPEALS.—

11 “(A) IN GENERAL.—A party to a workers’
12 compensation settlement agreement that is dis-
13 satisfied with a determination under paragraph
14 (3)(B), upon filing a request for reconsideration
15 with the Secretary not later than 60 days after
16 the date of notice of such determination, shall
17 be entitled to—

18 “(i) reconsideration of the determina-
19 tion by the Secretary (with respect to such
20 determination);

21 “(ii) a hearing before an administra-
22 tive law judge thereon after such reconsid-
23 eration; and

24 “(iii) judicial review of the Secretary’s
25 final determination after such hearing.

1 “(5) ADMINISTRATION OF MEDICARE SET-ASIDE
2 PROVISIONS.—

3 “(A) OPTIONAL DIRECT PAYMENT OF
4 MEDICARE SET-ASIDE AMOUNT.—

5 “(i) ELECTION FOR DIRECT PAYMENT
6 OF MEDICARE SET-ASIDE AMOUNT.—Effective
7 tive 30 days after the date of enactment of
8 this subsection, with respect to a claim for
9 which a workers’ compensation settlement
10 agreement is or has been established, a
11 claimant or workers’ compensation payer
12 who is party to the agreement may elect,
13 but is not required, to transfer to the Sec-
14 retary a direct payment of the Medicare
15 set-aside amount. The parties involved may
16 calculate the Medicare set-aside amount of
17 such set-aside using any of the following
18 methods:

19 “(I) In the case of any Medicare
20 set-aside of a compromise settlement
21 agreement under paragraph (2)(C)(ii),
22 the amount calculated in accordance
23 with such paragraph.

24 “(II) In the case of any Medicare
25 set-aside, the amount based upon the

1 payment amount for items and serv-
 2 ices under the workers' compensation
 3 law or plan and fee schedule (effective
 4 as of the date of the agreement) in ac-
 5 cordance with paragraph (2)(C)(i)(I).

6 “(III) In the case of any Medi-
 7 care set-aside, the payment amount
 8 applicable to the items and services
 9 under this title as in effect on the ef-
 10 fective date of the agreement.

11 Such transfer shall be made only upon
 12 written consent of the other party or par-
 13 ties to the agreement.

14 “(ii) ELECTION SATISFYING LIABIL-
 15 ITY.—An election made under clause (i),
 16 with respect to a qualified Medicare set-
 17 aside shall satisfy any payment, in relation
 18 to the underlying claim of the related
 19 workers' compensation settlement agree-
 20 ment, required under subsection (b)(2) to
 21 be made by the claimant or payer to the
 22 Secretary.

23 “(B) ELECTION OF PROFESSIONAL OR
 24 BENEFICIARY SELF ADMINISTRATION OF MEDI-
 25 CARE SET-ASIDE PAYMENTS.—Nothing in this

1 subsection or subsection (p) prohibits an indi-
2 vidual from electing to utilize professional ad-
3 ministration services or to self-administer pay-
4 ments of their Medicare set-aside in accordance
5 with existing law.

6 “(6) TREATMENT OF STATE WORKERS’ COM-
7 PENSATION LAW.—For purposes of this subsection
8 and subsection (p), if a workers’ compensation set-
9 tlement agreement is accepted, reviewed, approved,
10 or otherwise finalized in accordance with the work-
11 ers’ compensation law of the jurisdiction in which
12 such agreement will be effective, such acceptance, re-
13 view, approval, or other finalization shall be deemed
14 final and conclusive as to any and all matters within
15 the jurisdiction of the workers’ compensation law,
16 including—

17 “(A) the determination of reasonableness
18 of the settlement value;

19 “(B) any allocations of settlement funds;

20 “(C) the projection of future indemnity or
21 medical benefits that may be reasonably ex-
22 pected to be paid under the State workers’ com-
23 pensation law; and

24 “(D) in the case of a compromise agree-
25 ment, the total amount that could have been

1 payable for a claim which is the subject of such
 2 agreement in accordance with paragraph
 3 (2)(C)(ii).”.

4 (c) CONFORMING AMENDMENTS.—Subsection (b) of
 5 such section is further amended—

6 (1) in paragraph (2)(B)(ii), by striking “para-
 7 graph (9)” and inserting “paragraph (9) and sub-
 8 sections (p) and (q)”;

9 (2) in paragraph (2)(B)(iii)—

10 (A) in the first sentence, by striking “In
 11 order to recover payment” and inserting “Sub-
 12 ject to subsection (q), in order to recover pay-
 13 ment”; and

14 (B) in the third sentence, by striking “In
 15 addition” and inserting “Subject to subsection
 16 (q), in addition”; and

17 (3) in paragraph (3)(A), by striking “There is
 18 established a private cause of action” and inserting
 19 “Subject to subsection (q), there is established a pri-
 20 vate cause of action”.

21 (d) MODERNIZING TERMINOLOGY FOR PURPOSES OF
 22 MEDICARE SECONDARY PAYER PROVISIONS.—Subsection
 23 (b)(2)(A) of such section is amended by striking “work-
 24 men’s compensation law or plan” and inserting “workers’
 25 compensation law or plan” each place it appears.

1 (e) LIMITATION ON LIABILITY.—The parties to a
2 workers’ compensation settlement agreement which met
3 the provisions of section 1862(b) of the Social Security
4 Act (42 U.S.C. 1395y(b)) on the effective date of settle-
5 ment shall be accepted as meeting the requirements of
6 such section notwithstanding changes in law, regulations,
7 or administrative interpretation of such provisions after
8 the effective date of such settlement.

9 (f) EFFECTIVE DATE.—The amendments made by
10 this section, unless otherwise specified, shall apply to a
11 workers’ compensation settlement agreement with an ef-
12 fective date on or after January 1, 2018.

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