



# ISSUE BRIEF

AMERICAN ACADEMY of ACTUARIES

## Medical Privacy in the Workers' Compensation System

In 1996, the Health Insurance Portability and Accountability Act charged the federal government with developing a set of rules regulating medical privacy within the health insurance system. In 2001, the U.S. Department of Health and Human Services released its *Standards for Privacy of Individually Identifiable Health Information*. These standards do not directly apply to the workers' compensation system, but they include provisions that limit the flow of medical information from covered entities to workers' compensation insurers and benefit administrators.

The privacy of medical information of patients injured while working should be considered no less sacrosanct than that of those patients injured outside of work. However, the American Academy of Actuaries' Workers' Compensation Subcommittee (Subcommittee) believes that *any medical privacy legislation or regulation* must ensure that the workers' compensation system continues to operate efficiently, while still protecting the privacy of workers' compensation claimants. The Subcommittee is concerned that medical privacy provisions need to recognize the difference in information needs between group health and workers' compensation claim payers. Otherwise, restricting the flow of information could lead to increased costs for employers from:

- Delays in the delivery of appropriate medical treatment, because workers' compensation payers must first determine whether the injury was work related and must be aware of other conditions to authorize appropriate treatment plans.
- Delays in the payment of workers' compensation benefits for lost wages, because lack of medical information may impede the ability of workers' compensation payers to reduce lost wage benefits through aggressive treatment protocols.

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- Delays in returning injured workers to their jobs, because employers need information on medical conditions to determine if an injured worker is able to return to work, to assess the appropriate accommodations for light duty or restricted capacity, and to assure that the return to work will not result in re-injury.
- Difficulties administering state workers' compensation second injury funds, if information on pre-existing conditions is not available.
- Increased durations of disability, because of other delays in administering the workers' compensation system (e.g. independent medical examiners may be unable to obtain the information needed to determine the degree of permanent disability after maximum medical improvement occurs)

Workers' compensation service providers rely on timely medical information to reserve claims, assess return-to-work options, control losses, administer loss prevention programs, and determine coverage, among other functions. While it is appropriate that regulations govern how medical information is used for these purposes, overly restrictive regulations could restrain the workers' compensation system and increase costs. In an extreme example, concerns about potential penalties associated with the release of medical information to workers' compensation providers in Hawaii's medical privacy act caused workers' compensation hearings to stop and virtually shut down the system in that state. Hawaii's act has since been repealed.

Regulations should protect the medical privacy of all workers' compensation claimants without compromising the efficiency and effectiveness of the workers' compensation system. To that end, the Subcommittee recommends that all regulations and future legislation addressing this issue explicitly authorize and list permissible disclosures of individually identifiable medical information to employers and workers' compensation service providers along with restrictions on further disclosure of this information to other parties. This will preserve prompt access to the information workers' compensation service providers need for medical services and benefit administration, while still protecting the privacy of claimant medical information.

## Possible Consequences

Implementing medical privacy provisions without clarification on the permitted disclosures of protected health information to workers' compensation service providers and other parties could reduce the efficiency and effectiveness of the workers' compensation system and increase costs to employers. The Subcommittee has compiled the following specific examples of how system performance may be affected and how costs might increase if privacy regulations or legislation does not explicitly authorize and list permissible disclosures of individually identifiable medical information to workers' compensation service providers along with restrictions on further disclosure of this information to other parties.

**Claim frequency** - If injured workers refuse to authorize release of protected health information, or if doctors believe that regulations prevent them from transmitting information related to prior medical conditions, some workers' compensation claim payers may opt to pay many smaller claims rather than deny them and incur substantial legal costs in order to obtain the information needed to evaluate them properly. If claims due to non-occupational injuries are paid more often prospectively due to lack of medical information, this will increase the overall cost of workers' compensation coverage. Furthermore, claim frequencies may also increase if restrictions on the release of protected health information inhibit the ability of employers to access the individual claim information needed to design loss prevention programs, especially the redesign of workstations and other ergonomic programs included in the Department of Labor proposed ergonomic standards.

**Litigation and administrative costs** – The alternative to accepting claims with insufficient documentation is to deny them and force the release of information through the formal hearing process. This could delay the receipt of both lost income and medical benefits for the injured worker, plus the worker's information could become subject to public disclosure through the hearing process. Both employers and employees would incur legal costs on a significantly higher percentage of cases, and the budget of state workers' compensation agencies would have to increase in order to handle the increased caseloads.

**Medical claim severity** – Medical providers may experience increased costs and risks if they are required to make legal determinations as to the minimum amount of information it has to release when the workers' compensation claim payer requests "all the medical records you have on the patient," as is commonly the case. This may result in the provider's denial of care or delay in the receipt of payments. Delays in the receipt of information may inhibit the use of managed care techniques designed to reduce costs.

The key to controlling workers' compensation medical costs is early intervention and providing appropriate care for the injured worker. Without knowledge of pre-existing conditions, a workers' compensation payer may not authorize a more expensive initial treatment plan, which may have been deemed appropriate if complete medical information had been provided. An inappropriate treatment plan could lead to further complications, extended medical care, and significantly higher indemnity costs due to a prolonged period of disability.

**Indemnity claim severity** – Restrictions on the release of protected health information to workers' compensation payers could increase the amount and duration of disability benefits in several ways.

First, temporary disability payments may increase due to the extended amount of time needed to accept or deny a claim. If the workers' compensation payer routinely denies claims due to insufficient information, then more claims are likely to be litigated and result in longer durations. Alternatively, if the workers' compensation payer routinely begins payments immediately to avoid litigation, then more will have been paid on claims that were ultimately denied.

Second, if employers are unable to receive adequate information on the accommodations needed to facilitate the injured workers' ability to return to work at either restricted or full capacity, then temporary total and/or partial benefits may increase.

Finally, restrictions on protected health information could affect the amount and timing of permanent partial benefits by inhibiting the ability of the workers' compensation payer (or an independent medical examiner assigned by the state) to determine if the injured worker has reached maximum medical improvement and if so, the degree of permanent disability.

**Insurance industry financial uncertainty** – With reduced knowledge of a claimant's medical history, claim analysts may be less able to estimate accurately the ultimate cost of claims when establishing individual claim reserves. Because of this potential change in case reserve adequacy, it will likely take many years for actuaries to assess accurately the ultimate cost of claims in the new environment. This uncertainty could adversely affect the adequacy of future rate and reserve levels and may impair the financial condition of the workers' compensation insurance industry.

## **Conclusion**

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The Subcommittee believes that privacy regulations should be designed to preserve prompt access to the information that workers' compensation service providers need to administer benefits and medical services to injured workers, while still protecting the privacy of claimant medical information. Otherwise, the potential cost increases cited above could ultimately be borne by employers and/or insurers. Injured workers may also suffer significant delays in receiving benefits and a potentially greater loss of privacy due to an increasingly litigious workers' compensation system.



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