

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.

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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

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## 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.

○