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CROSS-PLAN OFFSETTING RAISES QUESTIONS FOR ERISA HEALTH PLANS

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March 12, 2019

A carrier practice known as "cross-plan offsetting" used to recoup overpayments to out-of-network (OON) healthcare providers "approaches the line of what is permissible" under ERISA's exclusive benefit rule, a federal appellate court ruled recently (*Peterson v. UnitedHealth Group Inc.*, No. 17-1744 (8th Cir. Jan. 15, 2019)). The court ultimately declined to decide the ERISA issue, finding the carrier's interpretation of plan language to allow for cross-plan offsetting was not reasonable. However, the US Department of Labor (DOL) weighed in on the case, expressing its view that recouping one ERISA plan's overpayments to an OON provider by reducing a separate ERISA plan's payments to that provider violates ERISA. Besides reviewing plan documents, service agreements and service providers' actual practices for any cross-plan offsetting and recoupment of overpayments, plan sponsors should consult with legal counsel about their fiduciary obligations and any necessary next steps.

WHAT IS CROSS-PLAN OFFSETTING?

Cross-plan offsetting is a so-called "bulk-recovery practice" that at least one carrier has used for a number of years to collect overpayments made to providers. Cross-plan offsetting occurs after a fully insured plan's carrier or a self-funded plan's third-party administrator (TPA) determines some type of error caused a provider — whether in-network or OON — to receive an overpayment for a claim paid by the health plan. The overpayment is then reimbursed — or "offset" — with another health plan's payments owed to the same provider.

In some cases, the overpayments made from one employer's fully insured plan are offset by reducing payments to the OON provider under a different employer's self-funded plan. In essence, the self-funded plan refunds the carrier for its overpayment under the fully insured plan. The OON provider receives the amount payable for services under the self-funded plan, less the overpayment previously received from the fully insured plan, with the carrier keeping the difference to make itself whole. As a result, a self-funded plan participant could face higher balance-billing for OON charges not paid by the self-funded plan, plus the recoupment or offset kept by the carrier.

FIDUCIARY CONCERNS RAISED BY CROSS-PLAN OFFSETTING

Cross-plan offsetting raises important fiduciary issues. ERISA fiduciaries must prudently carry out their plan duties for the *exclusive purpose* of providing benefits to participants and their beneficiaries and defraying the plan's reasonable administrative expenses (29 USC § 1104(a)(1)). These requirements obligate a fiduciary to recover a plan's overpayments, but allow some discretion. For example, a fiduciary could determine that the cost of recouping excess benefits would exceed the amount overpaid.

Fiduciaries also have a number of other obligations. ERISA prohibits a fiduciary from using plan assets for its own self-interest or for any purpose other than providing benefits and defraying reasonable administrative expenses (29 USC § 1103(c)(1) and (29 USC § 1106(b)). With regard to health plans, ERISA fiduciaries must prudently select and monitor service providers and follow plan terms, among other duties (see DOL Information Letter 1998-02-19 related to selecting health plan service providers).

COURT'S RULING ON CROSS-PLAN OFFSETTING IS LIMITED

In the current case, OON providers challenged UnitedHealth Group's practice of offsetting a fully insured plan's overpayments by reducing a self-funded plan's payments owed to them. The 8th US Circuit Court of Appeals focused almost exclusively on the plans' documents, finding none of the plans explicitly — or implicitly — authorized cross-plan offsetting, although some did permit *same*-plan offsetting. The court rejected the argument that plan language granting the carrier broad authority to administer the plan essentially permits cross-plan offsetting.

While the court did not decide whether cross-plan offsetting violates ERISA, the judges noted the practice "at the very least … approaches the line of what is permissible." Even though carriers and TPAs may be fiduciaries to multiple plans, the court stressed that a fiduciary's duties apply separately to each separate ERISA plan. Cross-plan offsetting, according to the court, "is in tension with this fiduciary duty because it arguably fails to pay a benefit owed to a beneficiary under one plan in order to recover money for the benefit of another plan." This transfer of money between plans may violate ERISA's ban on using a plan's assets for any purpose other than paying benefits and administrative expenses on behalf of the plan's own participants and beneficiaries.

The court didn't address the carrier's potential conflict of interest in recovering overpayments made by fully insured plans — losses the carrier would otherwise bear — by withholding payments from self-funded plans. Nor did the court address the carrier's argument that any conflict is waived because plan sponsors purportedly had the opportunity to opt out of cross-plan offsetting.

The carrier in this particular case has asked the 8th Circuit to stay enforcement of the ruling, pending its appeal to the US Supreme Court.

DOL Argues Cross-Plan Offsetting Violates ERISA

While the 8th Circuit declined to rule whether cross-plan offsetting violates ERISA, a DOL amicus brief makes plain the agency's concerns about this practice when a self-funded plan is used to recoup a fully insured plan's overpayments to OON providers, arguing:

- The carrier failed to meet its ERISA fiduciary duty to act in the exclusive interest of plan participants or for the purpose of providing their benefits.

- The carrier engaged in prohibited self-dealing by using self-funded plan assets to recoup overpayments made by the carrier's fully insured plans.

- Plan sponsors' opportunity to opt out of cross-plan offsetting didn't cure the carrier's conflict of interest, which is a clear ERISA violation.

While the same issues may exist for offsetting in-network payments, the DOL noted in-network offsetting doesn't present the same financial risk to plan participants. In-network providers typically have contractual relationships with plans and insurers, generally removing any plan's or participant's interest in disputes over provider payments.

EMPLOYER NEXT STEPS

Although the 8th Circuit ruled only that the carrier's practices were not permitted under the terms of the plan documents, the decision notes that cross-plan offsetting raises a number of ERISA issues. In addition, the DOL clearly believes the practice — at least in this particular case — violates ERISA, which could signal future enforcement actions on cross-plan offsetting. Additional guidance explaining DOL's views of this practice and the circumstances — if any — under which it may be permitted would be helpful.

Unless and until the DOL issues more guidance, employers with self-funded health plans subject to ERISA should:

- Review plan documents to see if cross-plan offsetting is permitted — implicitly or explicitly.
- Analyze administrative-service agreements and determine whether — and if so, how — the TPA recoups overpayments through cross-plan offsetting or other means. Follow up with TPAs if additional information is necessary.
- Review any notices, opt-out agreements or consent requests, sample plan language, or other specific TPA communications related to offsetting.
- Ask service providers to report whether they made any offsets against payments from the self-funded plan, whether the plan specifically made any overpayments, and whether/how those amounts were recouped.
- Consult with legal counsel in reviewing these materials, the employer's own fiduciary obligations (including any co-fiduciary liability), and indemnities with service providers before deciding how to handle any cross-plan offsetting.

RELATED RESOURCES

- Motion for Stay in *Peterson v. UnitedHealth Group Inc.* (8th Cir., filed March 5, 2018)
- Decision in *Peterson v. UnitedHealth Group Inc.*, No. 17-1744 (8th Cir., Jan. 15, 2019)

- Amicus Brief in *Peterson v. UnitedHealth Group Inc.* (DOL, filed Sept. 13, 2017)
- Information Letter 1998-02-19 on ERISA Fiduciary Duty to Consider Quality in Selecting Healthcare Services. (DOL, Feb. 19, 1998)

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