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Is the Claims Administrator for Your Group Health Plan Engaging in Cross-Plan Offsetting for Its Own Benefit at the Expense of Your Employees?

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Cross-plan offsetting is a common billing practice used by claims administrators. Although the Eighth Circuit did not say the practice did violate ERISA, it did say that the practice may violate ERISA. However, the Department of Labor has stated unequivocally that cross-plan offsetting violates the fiduciary duties required under ERISA.

Cross-plan offsetting is a common billing practice utilized by claims administrators, such as UnitedHealth Group, Inc. and Anthem, which made legal headlines last year in *Peterson v. UnitedHealth Grp., Inc.* [913 F.3d 769, 772 (8th Cir. 2019)] In the *Peterson* case, the Eighth Circuit and the Department of Labor (DOL) weighed in on the practice of cross-plan offsetting which was the focus of two class actions filed against UnitedHealth Group, Inc. and several of its affiliates (United). Both insurance carriers and plan sponsors carefully followed the court decisions, as the legality of cross-plan offsetting hung in the balance. While the Eighth Circuit only went so far as to say that the practice may violate the Employee Retirement Income Security Act of 1974 (ERISA), the DOL made clear its stance regarding the practice, stating unequivocally that cross-plan offsetting violates the fiduciary duties required under ERISA.

The purpose of this article is to: (1) explain the practice of cross-plan offsetting; (2) provide a brief overview of the fiduciary duties set forth under ERISA; (3) review the Eighth Circuit's decision regarding the practice; (4) present the DOL's opinion on the same; and (5) consider next steps for plan sponsors of self-funded plans in light of the recent legal developments.

The Practice of Cross-Plan Offsetting

Simply put, cross-plan offsetting is a claims administrator's self-help solution to correcting any overpayments it may make to healthcare providers. While claims administrators may use cross-plan offsetting between in-network providers as well as out-of-network providers, the focus of the *Peterson* case was the practice of cross-plan offsetting among out-of-network providers. An out-of-network provider is a healthcare provider with whom the claims administrator does not have a contract for provision of services to plan participants, negotiated payment rates, and other terms such as a prohibition on balance billing. Cross-plan offsetting allows claims administrators to quickly recoup any alleged overpayments it made for services provided to a participant in Plan A by simply underpaying the provider for services rendered to a plan participant in Plan B (a completely different group health plan). Absent the utilization of cross-plan offsetting, the claims administrator would need to initiate a payment dispute with the provider and wait for the dispute to be resolved, which may or may not be resolved in favor of the claims administrator, or limit the offset to payments for services rendered to participants in the same plan (although the DOL might find even intra-plan offsetting problematic).

For example, Sue obtains healthcare services under her employer's group health plan (Plan A) from an out-of-network provider. The claims administrator pays the provider $450 only to realize later that the provider should have been paid $350 for the services rendered to Sue. Subsequently, Tom obtains healthcare services from the same provider under his employer's group health plan (Plan B) and under which the provider also is an out-of-network provider. The claims administrator receives a claim for the services provided to Tom in the amount of $500. To address the $100 overpayment previously made with respect to Sue, a participant in Plan A, the claims administrator only pays the provider $400 for the provider's services to Tom, a participant in Plan B. By paying the provider $100 less than what it is owed with respect to the services provided to Tom, the claims administrator has offset (or recouped) the $100 overpayment it made in relation to Sue.

While United argued that this practice was harmless and even benefitted plan participants [*Peterson v. UnitedHealth Grp., Inc.*, 242 F. Supp. 3d 834, 844 (D. Minn. 2017)], the court ultimately found that the only party truly benefitting was United.

Fiduciary Duties under ERISA

Under ERISA, fiduciaries must discharge their duties with respect to ERISA plans: (i) solely in the interest of the plan participants and beneficiaries (duty of "exclusive loyalty"); (ii) for the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying reasonable expenses of administering the plan (duty of "exclusive purpose"); (iii) with the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use (under the same circumstances) in the conduct of an enterprise of a like character and

with like aims; (iv) by diversifying the investments of the plan to minimize the risk of large losses; and (v) in accordance with the documents and instruments governing the plan insofar as the documents and instruments are consistent with ERISA. [ERISA §404(a)(1); 29 USC §1104(a)(1)]

Courts have recognized the above fiduciary obligations as being the highest standard. [*See Peterson v. UnitedHealth Grp., Inc*., 242 F. Supp. 3d 834, 843 (D. Minn. 2017)] According to the US Supreme Court, ERISA imposes higher-than-marketplace quality standards on insurers. [*Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108, 128 S. Ct. 2343, 2346 (2008)] It is this higher standard of care owed by ERISA plan fiduciaries that creates the framework within which the practice of cross-plan offsetting was reviewed by the Eighth Circuit and the DOL, and in particular, United's fiduciary duties involving exclusive loyalty and exclusive purpose.

Eighth Circuit Finds Cross-Plan Offsetting Not Permitted by Plan Documents and May Violate ERISA

Bringing legal action on behalf of their patients who were enrolled in group health plans administered by United, two out-of-network providers claimed that United intentionally failed to pay the providers the full amounts they were owed. [*Peterson v. UnitedHealth Grp., Inc.,* 242 F. Supp. 3d 834, 836 (D. Minn. 2017)] According to the plaintiffs, United notified the providers that they had been overpaid, and both providers disputed that fact, refusing to return the alleged overpayments. [*Id*. at *838] In response, United recouped those disputed overpayments through cross-plan offsetting, a practice it started back in 2007. [*See Id.* and *see Peterson* v. *UnitedHealth Grp., Inc.,* 913 F.3d 769, 772 (8th Cir. 2019)]

By way of background, United administers both fully-insured and self-insured health plans governed by ERISA. With the fully-insured plans, United is financially responsible for paying participant/provider claims out of its own funds. With the self-insured plans, United pays participant/provider claims using the funds of the employer/plan sponsors and the employees/plan participants. In *Peterson*, the court noted that fully-insured plans accounted for only 22 percent of all claim payments, with the remainder coming from self-insured plans. [*Peterson*, 242 F. Supp. 3d 834, 836 (D. Minn. 2017)]

However, when reviewing the plans for the purpose of recouping overpayments, the court found it was always the fully-insured plans that were the victims of United's alleged overpayments and it was always the self-insured plans' claims that were underpaid to offset United's overpayments with its fully-insured plans. [*Id*. at *840] In other words, United was using the assets of the self-funded group health plans to make up for any overpayments it allegedly made from its own assets to providers. [*See Id.* (stating every one of the offsets at issue put money in United's pocket, with the majority of that money being taken out of the pockets of sponsors of self-insured plans.)]

Despite United's claim that the plan documents authorized cross-plan offsetting, the Eighth Circuit determined otherwise. [*Peterson*, 913 F.3d 769, 776 (8th Cir. 2019) (stating none of the plan documents even come close to authorizing the billing practice, and United's assertion that it has authorization, as determined by its interpretation of the plans, is baseless when looking at the plans' language.)] The court further noted that United's cross-plan offsetting put its self-insured plan clients at risk, specifically the participants of those plans, because it is the participants who ultimately bear the legal responsibility for paying their medical bills. [*Peterson*, 242 F. Supp. 3d 834, 844 (D. Minn. 2017)] As the district court explained, United's failure to issue full payment to the providers (a right the participants are entitled to under their group health plans), leaves the participants vulnerable to those providers seeking full payment by requiring the participants to make up the amount United refused to pay, a practice commonly referred to as "balance billing." [*Id*.]

On an interlocutory appeal, the Eighth Circuit Appellate Court did not declare outright that cross-plan offsetting violates ERISA, but it did state that that the practice "is in some tension with the requirements of ERISA" and "at the very least it approaches the line of what is permissible." [*Peterson*, 913 F.3d 769, 776 (8th Cir. 2019)] The Court of Appeals explained that while administrators of multiple plans, such as United, may be fiduciaries for all of those plans, that does not alter the fact that each plan is a separate entity and fiduciary duties are owed to each separate plan. [*Id*.] Accordingly, the Court found that engaging in cross-plan offsetting raises concerns of the "exclusive purpose" requirement as provided under ERISA §404(a)(1), 29 USC 1104(a)(1). [*Id*. at *777] While the Eighth Circuit did not say that cross-plan offsetting is a *per se* violation, the Court determined the practice is "questionable at the very least." [*Id*.]

To be clear, the reason the Eighth Circuit did not specifically address whether cross-plan offsetting is

a *per se* violation of ERISA is because the plaintiffs failed to raise that specific cause of action. [*See generally Peterson v. UnitedHealth Grp., Inc.,* No. 14-2101 (PJS/BRT), 2019 U.S. Dist. LEXIS 63373 (D. Minn. Apr. 12, 2019)] While the plaintiffs alluded to the fact that they had a claim against United for breaching its ERISA fiduciary duties, the plaintiffs did not timely assert that specific cause of action and the litigation focused solely on whether the plan documents permitted United's offset practice.

While the Eighth Circuit's finding that cross-plan offsetting at least creates tension with ERISA was enough to give claims administrators and plan sponsors pause regarding the practice, the DOL left no doubt where it stood on the issue.

DOL States Cross-Plan Offsetting Violates ERISA

During interlocutory appeal, the DOL filed an *amicus* brief in which it made its stance regarding cross-plan offsetting perfectly clear. According to the DOL, cross-plan offsetting violates ERISA's duty of loyalty and constitutes self-dealing under ERISA's prohibited transactions.

The DOL explained United's cross-plan offsetting violates its fiduciary duty under Section 404 of ERISA to "act exclusively in the plan participants' interests and to provide participants their plan benefits." [*Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees* at 6-7, *Peterson v. UnitedHealth Grp., Inc.* 913 F.3d769 (8th Cir. 2019)] The DOL further stated that because United's practice to recoup its alleged overpayments for its fully-insured plans (funded through United's own accounts) was achieved by making underpayments for the self-insured plans (funded by employer plan sponsors and their employees), United's transactions constituted self-dealing which is clearly prohibited by Section 406 of ERISA. [*Id*. at 7]

As to ERISA's fiduciary duty of loyalty, the DOL made it clear that United had a duty of loyalty to each separate group health plan as well as to each individual plan participant. [*Id*. at 10] In addition, pursuant to ERISA §406(b), 29 USC 1106(b), as a plan fiduciary, United was prohibited from dealing with plan assets in its own interest and "from acting in any capacity on behalf of a party whose interest is adverse to those of the plan or plan participants in transactions with the plan." [*Id*.] According to the DOL, there was nothing United could argue that would justify its violation of its fiduciary duties owed to the participants of the self-insured plans just so it could recoup the unrelated overpayments it made with respect to its fully-insured plans. [*See Brief for the Secretary of Labor* at 8] Even if the self-insured plans had consented to cross-plan offsetting, such consent would not excuse United from breaching its fiduciary duties because such breach is a *per se* violation under ERISA. [*Id*.] Enabling language in plan documents, service agreements or contracts cannot circumvent ERISA's fiduciary obligations.

Considerations for Plan Sponsors of Self-Insured Plans

In light of the *Peterson* case, employers that sponsor self-insured plans should take various steps to ensure their plans' terms and practices comply with ERISA. First, plan sponsors should review their plan documents to understand what they say about overpayments. If the plans allow cross-plan offsetting, revisions are necessary because such language does not change the fact that, in the opinion of the DOL, cross-plan offsetting violates ERISA.

Second, plan sponsors need to review their service agreements with claims administrators. While many claims administrators have begun changing their practices to exclude cross-plan offsetting in response to *Peterson,* for example, last summer Anthem declared that it would no longer engage in offsetting and cross-plan offsetting with non-participating/out-of-network providers [BRMS, Vendor Updates: Anthem, "Notice of Anthem's Offsetting Practices" (Aug. 9, 2019), *https://www.brmsonline.com/blog/vendor-updates/2019/notice-of-anthems-offsetting-practices* (last viewed on 2/23/2020)], plan sponsors need to be proactive and understand how their claims administrators are addressing overpayments. An amendment or new agreement is necessary if the current one allows for cross-plan offsetting.

Third, and finally, plan sponsors must continue to monitor the practices and fees of their claims administrators to ensure they follow the parties' agreed on terms. Too often, plan sponsors will initially review the actions and associated fees of their third-party administrators and then fail to monitor them over time. As the *Peterson* case demonstrates, claims administrators can change their practices after contracting with their clients without the clients' knowledge or consent, making it crucial that plan sponsors keep a vigilant eye on their claims administrators' practices and procedures to ensure compliance, not only with the parties' agreed on terms, but with ERISA as well. ■