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BLOG

Cross-Plan Offsetting Case Triggers Legal Concerns for Plan Sponsors

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A recent ruling by the Eighth Circuit Court of Appeals has determined that an insurance industry practice of shorting future payments to providers to offset prior overpayments (commonly referred to as “cross-plan offsetting”) is troublesome under ERISA’s exclusive benefit and prohibited transaction rules.

In *Peterson v. UnitedHealth Group, Inc.*, the Eighth Circuit Court of Appeals held that United Health Group was not authorized to engage in the practice of cross-plan offsetting because the plan documents at issue in the case did not authorize such practice; and further, plan language granting it broad authority to administer the plan was not sufficient to authorize cross-plan offsetting.

Under cross-plan offsetting, also sometimes referred to as “bulk payment recovery” or “cross-plan subsidization,” an insurer or third party administrator seeks to remedy prior actual or purported overpayments to a provider, or group of providers, on a batch of claims by offsetting future payments made to such providers under a different batch of claims. Because these claims are paid in bulk, they can include claims under both fully-insured and self-insured plans, and almost always involve claims of different payors, plans (including ERISA plans) and participants/patients. This practice primarily affects out-of-network claims where there are no network negotiated prices or overpayment recovery procedures, and participants can be balance billed for the outstanding amount not paid by the plan due to the offset. While this practice has been going on in the insurance industry for some time, it only recently came to light when providers began to sue (on an assignment of benefits theory) by standing in the shoes of plan participants whose claims were not fully paid due to the offset of a prior overpayment involving a different plan.

In *Peterson*, Judge Grasz stated that “nothing in the plan documents even comes close to authorizing cross-plan offsetting, the practice of not paying a benefit due under one plan in order to recover an amount believed to be owed to another plan because of that other plan’s overpayment.” The Court also rejected United’s argument that the plan language granting it broad authority to administer the plan was sufficient to authorize the cross-plan offsetting, stating that “such an approach would undermine plan participants’ and beneficiaries’ ability to rely on plan documents to know what authority administrators do and do not have.”

Significantly, the Court acknowledged that the practice of cross-plan offsetting is “in some tension with the requirements of ERISA.” While declining to affirmatively decide whether the practice violated ERISA, the Court opined that cross-plan offsetting potentially violated ERISA’s exclusive benefit rule by failing to pay a benefit owed to a beneficiary under one plan in order to recover money for the benefit of another plan, and may also be a prohibited transfer of assets from one plan to another. Notably, the Department of Labor filed an amicus brief in the case supporting the Court's decision, but more affirmatively stating that this practice violates ERISA.

Winston Takeaway. Plan sponsors have a fiduciary duty to monitor their service providers and to make sure that they are administering the plan in accordance with its terms and ERISA requirements. In light of the *Peterson* decision and the DOL's position on cross-plan offsetting, plan sponsors should inquire of their TPAs whether they engage in the practice of cross-plan offsetting as part of their overpayment recovery efforts and fully understand the way in which offsets are occurring under their plan, especially with respect to how this practice could impact their plan participants. Plan sponsors should endeavor to reach a compromise that would allow the TPA to seek overpayment recoveries on behalf of the plan without authorizing the TPA to engage in cross-plan offsets. In some cases, a TPA engaging in cross-plan offsetting may take an all or nothing approach, *i.e.*, if the plan wants to the TPA to provide overpayment recovery services, it needs to agree to allow the TPA to cross-plan offset. If this is the case, plan sponsors may wish to consider alternate strategies for overpayment recovery. Keep in mind that prudent overpayment recovery activities are a legitimate fiduciary requirement under ERISA.

Plan sponsors should also review their third party administrative services agreements, including annual updates and disclosures sent out by their TPAs, to see if overpayment recoveries are addressed, to clarify how overpayment recoveries are to be structured, and to make sure these processes are legally compliant and adequately disclosed in plan documents and summary plan descriptions. To the extent a TPA has engaged in cross-plan offsetting in the past, a plan sponsor should also seek to add indemnification language to its agreement with the TPA to protect the plan from liability due to the practice of cross-plan offsetting. However, keep in mind that this may still fall short in protecting the plan sponsor from potential co-fiduciary liability.

Please contact your regular Winston & Strawn employee benefits attorney for more information or for assistance in reviewing plan documents and administrative services agreements for legal compliance.

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