

Cross-Plan Offsetting in Group Health Plans—The DOL Makes its Position Clear

by Kimberly S. Couch on February 29, 2024

Under Section 404 of ERISA, plan fiduciaries must act for the exclusive benefit of plan participants and beneficiaries and use plan assets only to provide benefits and defray reasonable expenses of administering the plan. In addition, Section 406 of ERISA prohibits a plan fiduciary from engaging in self-dealing. The Department of Labor (“DOL”) has taken the position that “cross-plan offsetting” practiced by insurers and other third-party administrators (together, “TPAs”) that administer self-insured and insured group health plans violates Sections 404 and 406 of ERISA.

What is Cross-Plan Offsetting?

Under ERISA, a health plan may recover overpayments made to a participant or service provider by requesting a refund or reducing future benefits or payments. However, with cross-plan offsetting, a TPA seeks to recover an overpayment to a healthcare provider under one health plan that it administers by underpaying or “offsetting” an amount owed to the same provider under a different health plan it administers. Essentially, the TPA uses the assets of one health plan to pay or reimburse benefits provided under another health plan in violation of ERISA’s exclusive benefit rule. If an insurer TPA uses assets from a self-insured plan to reimburse overpayments in a fully insured plan, the TPA’s actions may violate ERISA’s prohibition against self-dealing. In addition, when cross-plan offsetting occurs, a healthcare provider may balance bill a patient because the patient’s plan has not paid the provider’s bill in full. This risk is higher with out-of-network healthcare providers that do not have contracts with the TPA. Here is an example.

Example: Company X maintains a self-insured health plan that contracts with Insurer Z as the TPA. Company Y maintains a fully insured health plan through Insurer Z. Due to a coding error, Insurer Z overpays a hospital \$1,000 for a claim incurred by Company Y’s employee. Subsequently, a Company X employee incurs a \$3,000 claim at the same hospital. Instead of paying the hospital \$3,000 for the Company X claim, Insurer Z pays the hospital \$2,000 and refunds Company Y’s plan \$1,000. If there is a dispute or it takes time to work out the claims, the hospital may balance bill Company X’s employee \$1,000.

Court Decisions on Cross-Plan Offsetting

In Peterson v. UnitedHealth Group, Inc., the U.S. Court of Appeals for the Eighth Circuit ruled that a TPA may not rely on general grants of administrative authority in a plan document to engage in cross-plan offsetting. The Court concluded that the practice of cross-plan offsetting is impermissible unless it is specifically authorized in health plan documents. The Department of Labor (“DOL”) filed an amicus brief in the case, concluding that UnitedHealth violated ERISA’s exclusive benefit rule under Section 404 and engaged in prohibited transactions (self-dealing) under Section 406 through its practice of cross-plan offsetting. The DOL stated that UnitedHealth’s practice involved a conflict of interest and observed that UnitedHealth primarily offset overpayments in its own fully insured plans by recouping payments from self-insured plans that it administered.

Following the Peterson decision, TPAs provided employers with plan, contract, and TPA agreement amendments permitting them to engage in cross-plan offsetting. These authorizations have become standard provisions in new plan documents, insurance contracts, and TPA agreements.

In a subsequent case, Scott v. UnitedHealth Group, Inc., participants filed a lawsuit alleging that UnitedHealth breached its fiduciary duties under ERISA by violating the exclusive benefit rule and engaging in self-dealing through cross-plan offsetting. The U.S. District Court for the District of Minnesota dismissed the claims for lack of standing because the participants alleged no facts demonstrating that their claims were subject to cross-plan offsetting or that they incurred any losses because of UnitedHealth’s practice. The court noted, however, that health plans may incur losses due to cross-plan offsetting.

In Lutz Surgical Partners PLLC v. Aetna, Inc., a New Jersey federal district court held, in an unpublished opinion, that Aetna’s cross-plan offsetting practice constituted a breach of the exclusive benefit rule and prohibited self-dealing under Sections 404 and 406 of ERISA, respectively.

DOL Settlement with EmblemHealth Inc. and News Release

In October of 2023, the DOL entered into a settlement agreement with EmblemHealth Inc. (“Emblem”), an insurer and TPA of employer-sponsored group health plans, resolving claims that Emblem breached its fiduciary duties under ERISA by engaging in the practice of cross-plan offsetting. You can find the settlement agreement here. The DOL’s initial lawsuit alleged that Emblem benefited at the expense of the group health plans and their participants by wrongfully retaining assets from one health plan to pay amounts owed by a different health plan. The DOL stated the practice also put participants at risk of being balanced billed, especially by out-of-network health care

providers. The settlement agreement requires Emblem to refrain from cross-plan offsetting for any ERISA-covered health plan. In addition, Emblem must make participants whole for any losses incurred from Emblem's cross-plan offsetting practices retroactive to July 16, 2015.

In its [news release](#) on the settlement, the DOL encourages employers and health plan participants to contact them with questions about their rights and responsibilities under ERISA and to notify the DOL if they are victims of cross-plan offsetting. Employers and participants may call the DOL's toll-free number for assistance at 866-444-3272.

What Should Employers Do?

Based on the potential ERISA violations and the practical problems that may result, employers that maintain health plans (particularly self-insured health plans) should determine whether their TPAs are engaging in cross-plan offsetting. Cross-plan offsetting provisions may appear in various plan documents, for example, (i) the plan booklet prepared by the TPA (which may serve as part or all of the health plan's summary plan description) and (ii) the insurance contract for an insured plan or the TPA agreement for a self-insured plan.

ERISA legal counsel can assist employers in reviewing documents, evaluating risks, negotiating document provisions, and requesting indemnifications for any losses incurred by plans or participants if a TPA refuses to remove cross-plan offsetting provisions. In addition, based on the DOL news release, an employer may contact the DOL directly or through its legal counsel for assistance in negotiating the removal of cross-plan offsetting provisions from plan documents, insurance contracts, and TPA agreements.

Please contact a member of our [Employee Benefits & Executive Compensation Group](#) if you have any questions regarding how cross-plan offsetting may affect your group health plan.



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