HAYS COMPANIES

Federal District Court Finds Cross-Plan Offsetting Violates ERISA

As described below, cross-plan offsetting is facing increasing legal scrutiny and adverse court decisions. Given this trend, self-insured plan sponsors may wish to review the practices of their TPAs to determine whether they are engaging in this questionable practice.

Last month, the Federal District Court in New Jersey held that Aetna's practice of cross-plan offsetting, in its role as the claims administrator for self-insured and fully insured medical plans, violated its ERISA fiduciary duties to plan participants. This recent ruling, alongside rulings in other recent cases and the Department of Labor's (DOL) expressed stance on the practice of cross-plan offsetting, brings into question future viability of cross-plan offsetting as an acceptable practice by third-party administrators and insurance carriers in an age of rising medical costs and corresponding billing disputes.

The term cross-plan offsetting refers to the practice in which a claims administrator withholds payment to an out-of-network provider for a benefit under one plan to recover an amount that the claims administrator believes it has overpaid to the same out-of-network provider for a benefit under another plan. While not specifically challenged until relatively recently, the cross-plan nature of this practice has always had a certain tension with ERISA fiduciary duties.

As part of a recent wave of cases based on this tension, in Lutz Surgical Partners PLLC, et al. v. Aetna, Inc., the U.S. District Court for the District of New Jersey held that Aetna's practice of cross-plan offsetting violated both Aetna's duty of loyalty ((Section 404(a)) and the prohibited transaction rule (Section 406(b)(2)) provisions of ERISA. Previous results in similar litigation had been somewhat inconsistent.

For instance, in the 2019 Eighth Circuit case of Peterson v. UnitedHealth Group Inc., the appellate court questioned whether cross-plan offsetting violates ERISA. In an amicus (friend of the court) brief filed in that case, the DOL made clear its position on the practice. The DOL stated unequivocally that cross-plan offsetting violates ERISA's duty of loyalty requirement and constitutes a prohibited transaction. Nevertheless, the court did not reach a conclusion on the ERISA issues. Rather, the court ruled against UnitedHealth Group on the basis that cross-plan offsetting was not authorized under the terms of the plans involved.

Subsequent to the Peterson case, cross-plan offsetting again faced legal challenge as a violation of ERISA in 2020's Scott v. UnitedHealth Group Inc. In that case, the U.S. District Court for the District of Minnesota did not have a chance to rule on ERISA issues, as the court found that the plaintiffs lacked appropriate standing to bring the suit. Accordingly, the court dismissed the case without prejudice.

The Lutz Court's Rulings

Unlike the two cases referenced above, the court in the Lutz case did make a ruling on whether cross-plan offsetting violates ERISA. It concluded based on the undisputed facts before it, Aetna's practice violated two ERISA provisions.

Aetna's Cross-Plan Offsetting Constitutes a Prohibited Transaction

The prohibited transaction rule found in Section 406(b)(2) of ERISA prohibits a plan fiduciary from "act[ing] in any transaction involving the plan on behalf of a party (or represent a party) whose interests are averse to the interests of the plan or the interests of its participants or beneficiaries." Previously the Third Circuit held that this section "creates a per se prohibition of a transfer between two funds [or plans] where the trustees are identical, but the participants and beneficiaries are not." Cutaiar v. Marshall, 590 F.2d 523, 531 (3d Cir. 1979). The Lutz court, citing this precedent, held that Aetna, in its role as fiduciary for two separate plans with different participants and beneficiaries, violated the prohibited transaction rule "'by failing to pay a benefit owed to a beneficiary under one plan to recover money for the benefit of another plan'" (quoting Peterson v. UnitedHealth Grp., Inc., 913 F.3d 769, 777 (8th Cir. 2019)).

Aetna's Cross-Plan Offsetting Breaches Its Duty of Loyalty

ERISA Section 404(a) provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." This provision is referred to as ERISA's duty of loyalty. The Lutz court reasoned that, by offsetting an alleged overpayment under one plan against payments for claims under another plan, Aetna was "discharging its duty of benefit payment under [one plan], which should be done for the exclusive purpose of serving the interests of [that plan's] participants and beneficiaries. However, such an offsetting serves another purpose unrelated to [that plan], i.e., recovering overpayments made under [another plan]." The court then concluded Aetna's practice of cross-plan offsetting violates Section 404(a).

ERISA Was Violated Despite Aetna's Defenses

In defense of the plaintiff's claims, Aetna argued its overpayment determinations were correct and the cross-plan offsetting was authorized under the terms of the plans involved. The Lutz court held that ERISA was violated by the practice even if the overpayment determinations were correct and the offsetting was authorized under the terms of the plan. The court observed that, although plan fiduciaries are generally authorized to act in accordance with the terms of the plan, they are prohibited from following the terms of the plan when those terms do not comply with ERISA.

Takeaways for Plan Sponsors

Given the current hostile climate towards cross-plan offsetting, sponsors of self-insured plans may wish to review whether their TPAs engage in this practice, and if so, whether they want to challenge the TPAs practice. A TPAs use of cross-plan offsetting can harm plan participants, as the participants of the plan under which payment is withheld to offset alleged overpayment under another plan remain potentially liable for the differences between the billed charges and the underpayment amount. Furthermore, as the ERISA plan administrator, plan sponsors have a general duty to monitor the actions of the TPA to ensure their actions do not negatively impact participants or risk violating ERISA themselves.

Finally, as the Scott court observed, "the fact that [the TPA] administers both self-insured plans (under which [the TPA] - as administrator - uses the plan's assets to pay claims) and fully insured plans (under which [the carrier] - as both administrator and insurer - uses its own assets to pay claims) puts [the TPA] in the position of being able to recoup its own losses from assets belonging to self-insured plans." In other words, a TPAs use of cross-plan offsetting could have a negative financial impact on sponsors of self-insured health plans.

The Hays Research and Compliance Team will continue to review and monitor developments regarding cross-plan offsetting.

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