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## The State of Cross-Plan Offsetting Litigation

In general, cross-plan offsetting occurs when (a) one health plan (“Plan A”) overpays a provider for services, (b) the provider declines to reimburse the overpayment, and (c) an insurer or third-party administrator (“TPA”) recoups the overpayment by paying that provider less when a different participant from a different plan (“Plan B”) receives services from the same provider. The provider is paid less for the subsequent service to offset the previously overpaid amount, and each plan’s account is debited/credited accordingly. This article examines recent court cases and developments that involve cross-plan offsetting. Fiduciaries need to be aware of cross-plan offsetting and how it impacts plan participants because the practice may violate ERISA.

### Eighth Circuit’s Decision in *Peterson*

In 2019, the United States Court of Appeals for the Eighth Circuit addressed cross-plan offsetting in *Peterson v. UnitedHealth Group* (“UHC”). The Eighth Circuit held that UHC could not engage in cross-plan offsetting without express approval in the plan document.

The Eighth Circuit did not decide whether cross-plan offsetting is legal, but it did state that the practice is “in tension with the requirements of ERISA.” The clearest guidance for plan sponsors came from the district court’s opinion, which held that a plan fiduciary is obligated to make a careful and fully informed decision about whether allowing a TPA to engage in cross-plan offsetting is in the best interests of the participants in their plan.

In response, UHC released an update on its cross-plan offsetting system in May 2023. UHC noted that the *Peterson* court found cross-plan offsetting to be unlawful only when it is not expressly authorized in the plan document. Consequently, UHC has inserted express authorization for cross-plan offsetting into its plan documents and automatically enrolls such plans into its offsetting system unless the plan affirmatively opts out of participating. Additionally, UHC has promised to assist plan sponsors with any litigation stemming from their plan’s participation in UHC’s cross-plan offsetting system since such participation comes with a risk that the provider claims that offsetting is an invalid payment method and elects to balance bill the Plan B participant instead.

### The Department of Labor Consistently Asserts That Cross-Plan Offsetting Violates ERISA

During *Peterson*, the Department of Labor (the “DOL”) submitted a brief to the Eighth Circuit expressing its view that cross-plan offsetting violates ERISA because the practice exposes the participants in Plan B to balance billing by out-of-network providers. The DOL has previously stated that “cross-plan offsetting

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practices punish and shortchange health plan participants and their beneficiaries and violate basic tenets of [ERISA]" and has backed up this position in other litigation. For example, in September 2023, the DOL reached a settlement with EmblemHealth Inc., a New York-based insurer and TPA, resolving claims that Emblem breached its fiduciary duties under ERISA by engaging in cross-plan offsetting.

## Courts Continue To Not Reach the Merits

In July 2024, the Eighth Circuit dismissed *Smith v. UnitedHealth Grp.*, another case involving UHC's cross-plan offsetting system. In *Smith*, the plaintiffs alleged that their plan document's authorization of cross-plan offsetting was inconsistent with ERISA, thereby constituting a breach of fiduciary duty. The Eighth Circuit held that in order to reach the issue of whether cross-plan offsetting violates ERISA, the plaintiffs must first show that they were harmed by the practice. The denial of benefits that a plan participant is contractually entitled to receive under the plan would be a sufficient harm, but the Eighth Circuit determined that the plaintiffs had received all the benefits to which they were entitled. The plaintiffs also alleged that they had been harmed because of the potential exposure to balance billing. However, the Eighth Circuit rejected this claim as speculative, in part because the district court found no evidence that a provider ever balance billed a patient even though UHC had cancelled hundreds of millions of dollars in debts through cross-plan offsets. Because the plaintiffs failed to show they had suffered a concrete injury, the case was dismissed on standing grounds before reaching the merits.

In January 2024, a federal district court in New Jersey took the opposite approach in *Brainbuilders LLC v. Aetna Life Ins. Co.* and agreed with the DOL's view that the risk of balance billing itself is a sufficient harm to allow a court to reach the issue of cross-plan offsetting's legality. However, the New Jersey district court also dismissed the case on standing grounds before reaching the merits because the plan's anti-assignment clause barred the plaintiff medical provider from bringing a claim on behalf of the plan's participants.

## Action Items for Plan Sponsors

In light of courts' varying responses to cross-plan offsetting, plan sponsors should determine whether their insurers or TPAs are engaging in the practice. Additionally, plan sponsors should:

- Review plan documents and summary plan descriptions to verify the plan authorizes cross-plan offsetting.
- Review administrative service agreements with TPAs to determine whether it is possible to opt out of cross-plan offsetting or limit the practice to in-network providers.
- Discuss with TPAs whether they offer assistance with potential litigation resulting from their use of cross-plan offsetting or have agreements with providers to not balance bill participants.
- Confirm that plan notices explain the impact cross-plan offsetting has on benefits (e.g., the practice does not result in a denial of benefits); and
- Monitor the scope and disposition of future cross-plan offsetting litigation.

If you have any questions about cross-plan offsetting and how it affects your group health plans or need assistance reviewing and negotiating service agreements, please contact a member of our Employee Benefits and Executive Compensation group.

