

DOL SETTLEMENT PROVIDES COMPLIANCE INSIGHT FOR CROSS PLAN OFFSET APPROACH



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On September 29, 2023, the U.S. Department of Labor (DOL) entered into a settlement agreement over cross-plan offsetting with EmblemHealth Inc. (Emblem). Emblem is an insurer and third-party administrator for group health plans. Cross-plan offsetting is a method used by insurers and third-party administrators to recover overpayments paid to a provider by reducing or eliminating payments to that same provider for another patient's claim covered under another employer group health plan, which can be either self-funded or fully insured.

DOL has previously expressed concerns with cross-plan offsetting (especially where self-funded plans are involved) because it views the process as taking assets from one plan (i.e., the overpayment) and using them to pay claims for another plan. In DOL's view, this could trigger one or more ERISA fiduciary breaches or prohibited transactions.

While the concept of cross plan offsetting is simple, the legal and compliance concerns are complex. There are several nuances with cross-plan offsetting depending on how the approach is structured. There are far less issues with participating providers who presumably agree to cross-plan offsetting in their network contracts and agree to hold participants and beneficiaries harmless from any balance billing.

Unresolved prohibited transaction and fiduciary issues are more pronounced where cross-plan offsetting crosses from an insured plan (where the insurer is financially responsible) to the insurer's self-funded business (where the plan is financially responsible). In other words, the argument is that the insurer is using a self-funded plan's assets to pay claims where the insurer would otherwise be responsible.

There are also issues with claims and appeals procedures and whether a cross-plan offset is an adverse benefit determination because the plan that owed the provider for the service is paying nothing or a reduced amount. The provider is being "paid" by offsetting the overpayment from another plan. In addition, if there is cross-plan offsetting, the practice likely needs to be addressed

in the plan and summary plan description, notifying participants and beneficiaries of the practice and when claims will not be paid from the plan because of the offset.

Cross-plan offsetting is most problematic with out-of-network providers because they have not agreed to the practice. There, if an otherwise valid claim for a participant in one plan is reduced because of overpayment based on a participant in a different plan there is a risk that the provider might balance bill the participant for the offset amount. DOL's focus in the settlement with Emblem was this potential for balance billing.



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DOL's settlement with Emblem consisted of four parts: A settlement agreement, a letter to participants and beneficiaries, a notice to be posted on Emblem's website, and a consent order. Pursuant to the settlement agreement, the consent order will only be filed with a court if Emblem breaches the settlement agreement.

The settlement agreement required Emblem to:

- Cease cross-plan offsetting.
- Remove cross-plan offsetting language from its policies, procedures and practices no later than January 1, 2024 (or for insured plans after any state required approval).
- Send a letter with an attached claim form to any participant affected by a cross-plan offset of \$50 or more from July 16, 2015, to September 29, 2023, informing them that if they were balance billed they should contact Emblem and that they will be entitled to reimbursement of the cross-plan offset amount. Emblem must also email the letter to any participant where Emblem had an e-mail address.
- Post a notice on Emblem's web portal with similar content to the letter.

The settlement agreement does allow Emblem to take reasonable steps and seek corroborating documentation that the participant was balance billed. The settlement agreement provides other relief such as requiring Emblem to notify credit reporting agencies if a participant notifies Emblem that debts for balance billed amounts appear on a participant's credit history. DOL also required extensive ongoing reporting on Emblem's reprocessing of claims subject to a cross-plan offset.

As mentioned, the consent order attached to the settlement agreement would only be filed with a court if Emblem breaches the settlement agreement. That consent order alleges fiduciary breaches based on ERISA's exclusive benefit requirement, prudence requirement, and requirement to act in accordance with plan documents. It further alleges prohibited transactions under three subsections of ERISA and a violation of ERISA's requirement for reasonable claims and appeals procedures. If the consent order were filed, Emblem does not admit to those allegations but agrees "not to submit any filing" denying the allegations.



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The DOL press release on the settlement can be found here. <https://www.dol.gov/newsroom/releases/ebsa/ebsa20231005>. The press release also contains a link to the settlement documents.

In addition to this settlement with DOL, plaintiffs' attorneys have brought fiduciary breach and prohibited transaction lawsuits on behalf of participants and beneficiaries with respect to cross-plan offsetting. The results of those lawsuits have been mixed, with some involving issues of whether participants and beneficiaries have "standing" to bring those actions. Emblem is the first public settlement we have seen with DOL on cross-plan offsetting although DOL has filed a "friend of the court" brief in one of the major cross-plan offsetting cases brought by participants and beneficiaries.

This is an issue that is continuing to evolve, and fiduciaries of self-funded plans should contact their third-party administrators to see if their plan engages in cross-plan offsetting and whether there are any limits to that practice. If cross-plan offsetting is permitted, then counsel should be consulted, and further review performed to see how cross-plan offsetting is implemented (and any compliance concerns) and to ensure the practice is properly reflected in any services agreement or summary plan description. ■

Attorneys John R. Hickman, Ashley Gillihan, Steven Mindy, Carolyn Smith, Ken Johnson, Amy Heppner, and Laurie Kirkwood provide the answers in this column. John is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley and Steven are partners in the practice, and Carolyn, Ken, Amy, and Laurie are senior members in the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by e-mail to John at john.hickman@alston.com.

