



FOLLOW THE PLAN AND KEEP IT LEGAL

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A recent Eighth Circuit Court of Appeals decision provides a good reminder about the importance of complying with ERISA.

In the matter of *Louis J. Peterson, D.C., et al. v. UnitedHealth Group Inc., et al.*, [Case No. 17-1744 (8th Cir. Jan. 15, 2019)], UnitedHealth Group, Inc., in its capacity as third party administrator of multiple self-funded health plans, had engaged in the process of using overpayments from one plan to offset underpayments of another plan. The Court ruled that this process of offsetting was not contemplated in the agreement and the governing plan instrument. The Court goes on to imply, though does not rule on, the fact that this practice might violate ERISA. The Department of Labor in its *Amicus Curiae* submitted to the Court in support of the Plaintiffs-Appellees, also expressed its view in cross-plan activity in violation of ERISA.

Following the Eighth Circuit Court's decision, UnitedHealth Group retains its argument that its practice of cross-plan setting is not violative of ERISA, and requested a delay in enforcement of the Court's decision. The insurer has indicated its intent to appeal the ruling to the Supreme Court.

As a general rule, ERISA requires that plan assets be used for the exclusive benefit of plan participants, i.e., participants in the plan from which assets are derived. The concept of exclusive benefit can come up in many contexts for example, use of rebates, including medical loss ratio standards, as well as use of plan assets in mergers and acquisitions situations.



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The specifics of this case notwithstanding, several points are important for plan sponsors to bear in mind to ensure compliance with ERISA:

1. A written plan document is required. The primary purpose of plan document is to set forth the rules and requirements governing the plan. Further, it is necessary to follow the terms of the plan document;
2. It is necessary to use plan assets for the exclusive benefit of participants in that plan; and
3. It is necessary for the plan sponsor, in its role as plan fiduciary, to act with the care, skill, prudence, and diligence as a prudent person would in a similar circumstance.

UPDATED HSA-MSA-FSA-HRA TAX PUBLICATION

The Internal Revenue Service recently updated its publication relating to tax-favored health plans for use in preparing 2018 returns. **Publication 969, Health Savings Accounts and Other Tax-Favored Health Plans** provides an overview of various tax saving vehicles used to offset health care costs including health savings accounts (HSA), medical savings accounts (MSA), health flexible spending arrangements (FSA plans), and health reimbursement arrangements.

It should be noted that this newly released version of the publication reflects the 2018 inflationary adjustments applicable to deductibles, out of pocket limits, contributions, and other changes in HSAs, MSAs and FSA plans.

- ◆ For 2019 inflationary adjustments applicable to HSAs, see *HSA Inflationary Adjustments for 2019* (*Benefit Beat*, 6/5/18).
- ◆ For 2019 inflationary adjustments applicable to the FSA cap and MSAs, see *2019 Benefit Plan Limits* (*Benefit Beat*, 12/3/18).

AMENDMENTS TO NEW JERSEY FAMILY LEAVE LAWS

New Jersey currently has several types of family leave laws in place; specifically, the Family Leave Act, the Family Leave Insurance law, and the Security and Financial Empowerment Act (SAFE Act). On February 19, 2019, Governor Phil Murphy signed a law amending these three leave laws, as follows.

□ Family Leave Act

The New Jersey's Family Leave Act requires covered employers to provide eligible employees up to 12 weeks of family leave in any 24-month period for birth of a child, placement of a child through adoption or foster care, or

to care for a family member with a serious health condition. Leave to care for one's own serious health condition is available through the New Jersey temporary disability law (see *Family Leave Insurance* discussed below).

Currently, the law applies to employers employing 50 or more employees on each working day during each of 20 or more calendar workweeks in the current or immediately preceding calendar year. For purposes of determining employer size, all employees are counted, without regard to the employee's place of work or residence. Beginning June 30, 2019, employer size is reduced such that the law will become applicable to employers employing 30 or more employees. Further, employers with 30 or more employees will become subject to the non-discrimination and non-retaliation provisions of the law, as well as job reinstatement obligations once employees return from leave.

To be eligible for family leave, an employee must be employed in New Jersey by a covered employer for a minimum of 12 months, and accumulated a minimum of 1,000 base hours of work in the 12 months preceding the need for leave.

Family leave may be paid, unpaid, or a combination of both. If an employer provides paid family leave for fewer than 12 workweeks, the additional weeks of leave added to attain the 12-workweek total may be unpaid. Leave may be taken on a consecutive, intermittent, or reduced leave schedule. Leave for the birth, adoption or foster care placement of a child can be taken any time within 12 months of the birth, adoption, or foster care placement. For intermittent leave to care for a family member, the law reduces the employee's obligation to provide advance notice from 30 days to 15 days. Notice for leave requests for a single continuous period remains at 30 days.

The amended law broadens the definition of family member, such that the term now includes:

- ◆ A child, whether biological, adopted, foster, step, or a child born via gestational carrier;
- ◆ A spouse, domestic partner, or civil union partner;
- ◆ A parent, whether biological, adopted, foster, step, parent-in-law, or a parent via gestational carrier;
- ◆ A sibling;
- ◆ A grandparent or grandchild;
- ◆ Any other individual related by blood to the employee, and



- ◆ Any other individual closely associated with the employee that is equivalent to a family relationship.

Additional information about the Family Leave law is available from New Jersey's Attorney General website (<http://www.nj.gov/oag/dcr/index.html>).

□ Family Leave Insurance

The New Jersey Family Leave Insurance benefits are intended to partially replace wages of employees who need to care for a seriously ill or injured family member, or to bond with a newborn or newly adopted child. The program complements the state's Temporary Disability Insurance program, which provides for partial wage replacement during an employee's own injury, illness, or other disability, including pregnancy.

Generally, all private and government employers subject to the New Jersey Unemployment Compensation law, regardless of size, are deemed to be covered employers for purposes of the Family Leave Insurance law. Employees eligible for Family Leave Insurance benefits are those who meet certain criteria; specifically, for 2019, the individual must have worked a minimum of 20 weeks, earning \$172 or more per week; or earned a minimum of \$8,600 in the past 12 months prior to the leave.

Amount of leave. Family Leave Insurance benefits are available for a maximum of six weeks in a 12-month period. The law was amended such that beginning July 1, 2020, an individual is entitled to use up to 12 weeks of consecutive leave, or 56 days of intermittent leave, in a 12-month period for baby bonding, or to care for a family member with a serious health condition.

Funding. The family leave program is funded solely by employee payroll deductions, determined as of September 1 of the prior calendar year; employers do not contribute to the program. Beginning January 1, 2019, each employee contributes 0.08% of the taxable wage base. The taxable wage base is the first \$34,400 in covered wages earned during the calendar year; the maximum yearly deduction for Family Leave Insurance is \$27.52.

Weekly benefit. The weekly benefit rate for Family Leave Insurance is based on the individual's average weekly wage. For claims beginning January 1, 2018, the weekly benefit rate is two-thirds (2/3) of the individual's average weekly wage, up to \$637. For 2019, the maximum weekly benefit increases to \$650. For intermittent claims, the daily benefit is calculated at one-seventh of

the individual's weekly benefit rate. Beginning July 1, 2020, the individual's weekly benefit rate will increase to 85% of the individual's average weekly wage, up to a maximum of 70% of the statewide average weekly wage, for a maximum weekly benefit of \$860.

Another change made by the amended law is the elimination of the 7-day waiting period for benefits.

Use of paid time off or other employer paid benefits. Prior to the law's amendment, employers were permitted to require employees to use up to two weeks of existing paid time off (PTO), vacation, or other employer-paid leave benefits before using family leave. This amended law prohibits this action, and allows only the employee to elect whether to use PTO or other similar benefits. Furthermore, an employee's use of PTO or similar benefits does not reduce the amount of family leave available to the employee.

Additional information for both workers and employers about the Family Insurance Program is available from the New Jersey Department of Labor and Workforce Development (<http://myleavebenefits.nj.gov/labor/myleavebenefits/>).

□ Security and Financial Empowerment (SAFE) Act

The SAFE Act provides job-protections to employees in the event the individual or his/her family member are victims of a domestic violence or sexually violent event.

This law applies to all private and public employers who employ 25 or more employees over 20 weeks in the preceding 12-month period. Employees eligible for the benefit are those who have worked for the employer a minimum of 12 months, and accrued a minimum of 1,000 base hours in 12-month period immediately preceding the need for leave.

The SAFE Act provides that an eligible employee be permitted to take up to 20 days of unpaid leave in a 12-month period should the individual need to obtain medical attention or legal assistance due to situations arising from domestic or sexual violence; or, to care for a family member who was a victim of domestic or sexual violence. Beginning July 1, 2020, an employee is allowed to use paid family leave during any part of the 20-day period of unpaid leave for such services.

Similar to the expanded definition of family member for purposes of the Family Leave Act (as above), beginning February 19, 2019, the term 'family member' includes:

- ◆ A child, whether biological, adopted, foster, step, or a child born via gestational carrier;



- ◆ A spouse, domestic partner, or civil union partner;
- ◆ A parent, whether biological, adopted, foster, step, parent-in-law, or a parent via gestational carrier;
- ◆ A sibling;
- ◆ A grandparent or grandchild;
- ◆ Any other individual related by blood to the employee, and
- ◆ Any other individual closely associated with the employee that is equivalent to a family relationship.

An employer cannot require an employee to use paid time off or other paid leave benefits prior to taking leave under the SAFE Act.

Additional information about the SAFE Act is available from New Jersey's Department of Labor and Workforce Development website (<http://nj.gov/labor/>).

ABOUT THE AUTHOR:

Karen R. McLeese is Vice President of Employee Benefit Regulatory Affairs for CBIZ Benefits & Insurance Services, Inc., a division of CBIZ, Inc. She serves as in-house counsel, with particular emphasis on monitoring and interpreting state and federal employee benefits law. Ms. McLeese is based in the CBIZ Kansas City office.

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