

ERISA Health Plan Reimbursement in Workers' Compensation Cases

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In many cases, the workers' compensation claimant may find the need to seek treatment on his own for medical care. This happens particularly when the claim is being denied or when certain medical care is being denied (i.e. further treatment sought when the medical provider chosen by the employer thinks that the employee is at MMI). When an employee incurs medical care on his own, it is usually paid for through the person's health insurance or through some public disability benefit. And nearly every provider of health benefits will have their hand out and want to get repaid at the time when the employee settles his case, even if the medical treatment was disputed by the employer. Therefore, the cost of such medical reimbursement claims must be taken into consideration when reaching a settlement or when proceeding to trial of the case.

I. WHAT IS ERISA?

ERISA is an acronym for Employee Retirement Insurance Security Act of 1974. ("ERISA", 29 U.S.C. §§ 1001-1461). ERISA governs all employee benefits provided by private employers or employee organizations (such as unions) in the U.S. It does **not** apply to benefits provided to employees of federal, state, and local governments, or to some benefits provided by religious organizations.

So, why do we need to know anything about ERISA in the workers' compensation arena? Because if an injured worker gets medical care, and his or her employer-sponsored health insurance pays for any or all of it, then you may have to deal with the ERISA plan's subrogation rights for what it paid. The first step is to find out if a plan is "**self-funded**," i.e., whether the employer assumes the risk for providing health care benefits to the plan participants. Because, while many states bar subrogation by health insurers, such state laws are preempted by ERISA for self-funded plans. Missouri is a state that bars subrogation, so the only ERISA health insurance plans that are entitled to subrogation are **self-funded** ERISA plans. Most large employers provide health benefits to their employees under a self-funded ERISA plan, while smaller employers often provide health benefits by purchasing an insurance policy through a company like Anthem or United Healthcare. This is an important distinction, because the plan of the employer who provides self-funded ERISA benefits would be entitled to subrogation in accordance with their health plan's provisions, while the plan of the employer who just purchases an insurance policy for their employees would not.

How to find out if the plan is self-funded. The plan's Summary Plan Description likely states the funding arrangement of the plan. Obtain the plan's Form 5500 through a document

request under 29 U.S.C. § 1024(b)(4). Or check FreeErisa.com for the plan's prior filings to see if they state the plan is funded by the General Assets of the employer. A blank Form 5500 is attached, and the boxes that should be carefully examined have been starred.

If the employee doesn't have access to the plan, prepare a letter for the client to give to the plan administrator, asking for the plan, Summary Plan Description, Form 5500s, and insurance contracts. Then, read it all.

The employee may have received a notice from a subrogation company indicating that they are seeking reimbursement for a plan. Get that notice from the employee and then investigate whether the health plan is a self-funded ERISA plan. Then, look at the plan to see what the plan's subrogation and reimbursement rights might be.

Third-party administrators. A third party administrator may be involved in a self-funded plan in order to process claims and administer the benefits. In other words, Anthem or United Healthcare may be acting as a mere administrator of the plan, but the employer is actually paying the health benefits out of the employer's own funds. So don't just assume that if the employee has health coverage through a well-known health insurance company that the plan must not be a self-funded ERISA plan. It may very well be that the health insurance company is merely acting as an administrator for the employer's self-funded ERISA plan. Do the research. If you don't, you may be jeopardizing your client's future health coverage by failing to pay a valid reimbursement claim.

II. HOW DO YOU RESOLVE CASES WHEN THERE IS AN ERISA SUBROGATION INTEREST?

There are several creative ways for the parties to handle ERISA subrogation claims in the settlement of workers' compensation cases. The first is often a win-win for both sides. If an injured employee knows that the health plan is seeking reimbursement, an injured employee can request that the employer reimburse the employee for their out-of-pocket expenses (i.e. copays) and then pay the ERISA subrogation claim directly with the carrier as part of the settlement. This approach makes the employee whole again, while also allowing the employer to negotiate the repayment claim.

Another way is for an employer to agree to pay the employee their out-of-pocket expenses, and then hold the employee harmless for any reimbursement claim. This is a good way to do things if the reimbursement claim hasn't been made by the plan yet, but it very well could be made in the future. It is also a good way to handle the situation if the employer is self-insured for both worker's compensation benefits and for health benefits.

An attorney for an employee is ill-advised to just ignore a health insurer's reimbursement rights.

ERISA governs other employee benefits policies, such as long term disability policies, and if these benefits are self-insured by the employer, there can be a subrogation right for amounts paid under a short term or long term policy if the person takes those benefits while the workers' compensation claim is pending. It is important again to read the plans to determine whether there is a right of reimbursement or subrogation held by the plan for those types of benefits.