

# Legislative Brief

## HCR - Stop-loss Insurance

December 2015

### DOL's Advisory Opinion — Whether Stop-loss Insurance Constitutes Plan Assets

#### SUMMARY:

- Sponsors of self-insured contributory health plans who purchase stop-loss insurance are encouraged to evaluate the facts and circumstances pertaining to the ownership of, payment of, and proceeds from the policy to minimize the likelihood of the policy being deemed a plan asset and triggering additional ERISA obligations.
- The DOL recently released Advisory Opinion 2015-02A, reaffirming its prior position that the purchase of stop-loss insurance policies by a plan sponsor does not constitute plan assets, under certain conditions.
- The plans primarily used the plan sponsor's general assets to fund the medical benefits of the plan, but provided for participant contributions to partly fund the plan as well, which distinguished this inquiry from earlier guidance.
- The DOL determined that the stop-loss policies did not constitute plan assets, despite participant contributions partly funding the plan, because the set of facts described were in all material respects identical to the facts in the DOL's 1992 Advisory Opinion. Additionally, the employer addressed the existence of employee contributions by 1) creating an accounting system to ensure payment of premiums did not include employee contributions; 2) ensuring the policies did not relieve the plans obligation to pay benefits to participants and the policies had no obligation to pay claims to participants; and 3) providing that the policies would only reimburse the plan sponsor if the plan sponsor paid the claims from their own assets.

Sponsors of self-insured health plans often purchase stop-loss insurance to manage risk and to lessen the potential threat of insolvency. Under stop-loss insurance, the insurer agrees to reimburse the employer (or plan) for claims paid by the employer that exceed the attachment point (specified aggregate amount or a specified amount for an individual claim). However, the employer must pay a claim or claims totaling the designated amount under the terms of the plan in order to trigger a responsibility on the part of the stop-loss carrier to reimburse the employer.

Stop-loss insurance does not convert a self-insured plan to a fully-insured plan because the employer or plan sponsor continues to remain liable for providing benefits to participants and beneficiaries. Stop-loss insurance may either be issued to the employer or the plan, although traditionally the contract is between the employer and insurance company, to avoid the characterization of the policy as a plan asset. Typically, stop-loss insurance is paid directly by the employer from general assets, or in some instances participant contributions.

#### Background

In 1992, the Department of Labor (DOL) released [Advisory Opinion 92-02A](#) addressing whether a stop-loss insurance policy purchased by the employer sponsoring a welfare benefit plan that provides benefits exclusively out of the employer's general assets would be an asset of the plan. The DOL stated that under the following set of facts, stop-loss insurance would not be considered a plan asset:

- The insurance proceeds were payable only to the employer;
- The employer had all rights of ownership under the stop-loss policy;
- Neither the plan nor any participant or beneficiary of the plan had any preferential claim against the policy or any beneficial interest in the policy;

- No representations were made to any participant or beneficiary that the policy would be used to provide benefits under the plan or that the policy in any way represented security for the payment of benefits;
- The benefits associated with the plan would not be limited or governed in any way by the amount of insurance proceeds received by the employer; and
- The plan did not, and would not, require or allow employee contributions.

The DOL also opined that the sponsor's general assets did not become plan assets solely because of the employer's promise to pay benefits.

### **DOL Advisory Opinion 2015-02A**

On October 19, 2015, the DOL released [Advisory Opinion 2015-02A](#) addressing whether stop-loss insurance policies purchased by a plan sponsor to manage risk associated with a self-insured contributory welfare plan would constitute plan assets.

In this instance, the plan sponsor administers: 1) a plan covering non-union employees; and 2) a plan covering employees under a collective bargaining agreement. Both plans provide medical, dental, vision, and health care flexible spending accounts and are largely funded from the general assets of the plan sponsor. Employees make contributions to their respective plans. These contributions were used to partly fund the medical benefit portion of the plans.

In this case, the DOL found the stop-loss policies did not constitute plan assets because:

- The facts surrounding the purchase of the stop-loss policies mirrored the facts from the 1992 advisory opinion, except for the existence of the participant contributions;
- An accounting system was designed to ensure that the payment of premiums for the policies did not include employee contributions;
- The purchase of stop-loss insurance did not relieve the plans of the obligation to pay benefits to plan participants nor did the stop-loss insurer have any obligation to pay claims of plan participants; and
- The policies would reimburse the plan sponsor only if the plan sponsor pays claims under the plans from the plan sponsor's own assets so that the plan sponsor never receives any reimbursement from the insurer for claims amounts paid with participant contributions.

### **Action To Be Taken**

Sponsors of self-insured health plans should re-evaluate their stop-loss insurance contract to determine whether the policy may constitute an ERISA plan asset. There are two basic situations where a stop-loss policy may be treated as a plan asset: 1) where the policy is issued to the plan; and 2) where plan assets (including participant contributions) are used to pay all or part of the stop-loss premiums. In the event a stop-loss policy is determined to be a plan asset, the ERISA trust rules and Form 5500 filing requirements are triggered.

Therefore, in order to minimize the likelihood that a stop-loss policy is considered a plan asset, the employer should be named the stop-loss policy holder, pay the premiums associated with the policy from the general assets, and receive the insurance proceeds. These factors should also be incorporated into the stop-loss insurance contract to avoid any discrepancies or ambiguity. The employer should periodically evaluate its facts and circumstances in accordance with the guidance published by the DOL.

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