Everything You Always Wanted To Know About Disability Offsets

Q: What are offsets?

A. Offsets are provisions in your disability coverage that allow your insurer to deduct from your regular benefit other types of income you receive or are eligible to receive from other sources due to your disability. Common types of offsets include, but are not limited to, Social Security disability benefits, worker's compensation benefits, and benefits from state disability programs like those offered in California, New York, New Jersey, Rhode Island, and Hawaii. Other common offsets include employer-provided disability retirement benefits, and in some cases, income received from a third party who may have caused the injury that resulted in your disability.

Q. Where can I find offset wording in my disability policy?

A. Usually the section of the policy (sometimes the policy will be labeled as either a "long term disability Plan" or a "Summary Plan Description') that explains your benefit amount will have language indicating that the insurer is allowed to deduct "other benefits" or "other income benefits." The policy will then have a separate section shortly thereafter explaining what types of benefits constitute "other benefits," and how the insurer will offset them from your regular benefit.

Q. I got my disability policy through my employer but I don't have my master policy–just an explanation of benefits. Is that enough to tell me what offsets are in my policy?

A. Probably. A federal law called the Employee Retirement Income Security Act, or "ERISA," governs employee benefits, including disability benefits. This law has extensive rules and regulations about what employers must do when they offer benefits to their employees, and how benefit claims should be treated. ERISA requires employers to give to their employees a "Summary Plan Description" which explains, in plain language that can be understood by the average plan participant, what the

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participant's rights and obligations are under the plan. This Summary Plan Description should include provisions regarding what kinds of offsets the insurance company is allowed to apply. If your Summary Plan Description does not include this information, you are still entitled to it, and you should ask your employer for it in writing.

Q. Does ERISA say what kinds of offsets insurers can take and which they can't?

A. No. ERISA is a regulatory law that is primarily concerned with explaining what employers and insurance companies must do if they offer benefits to employees. It does not tell employers and insurers what kinds of benefits they have to offer, or how those benefits should be calculated.

However, some States, such as California, have insurance regulations that may govern what offsets insurance companies may take from your benefits, and when they can take them. For instance, California does not permit insurance companies to offset Social Security benefits that you may be entitled to receive, until you have actually been awarded the benefits. There are exceptions to this rule if you are not cooperating in seeking the benefits to which you may be entitled.

Q. Why are insurance companies allowed to offset my disability benefits?

A. The short answer is because no law prohibits them from doing so. The longer answer is that if you were allowed to keep the full amount of all of the various disability benefits to which you might be entitled, it would be possible for you to earn more money on disability than you would by working. Disability benefit programs, both public and private, are designed to avoid this result. In addition, insurance companies are able to sell plans to your employer that suggest that they will be paying 60% or 70% of your pre-disability income, which is an attractive selling benefit to employers. However, the insurance companies have actuarial studies that have shown them that, in fact, if they are paying a claim, they end up paying substantially less than their potential financial obligation, as the offset provision of the policy allows the insurance companies to shift the burden to some other party.

Q. Is there anything I can do to get rid of offsets in my policy?

A. Generally no. If you are receiving a disability benefit through your employer, the terms of your disability benefit plan have already been negotiated between your employer and the insurance company,

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and there is nothing you can do to change it. If you are receiving benefits through a private insurance policy, you can try to negotiate with your insurer to remove offset provisions, but they are unlikely to be receptive to your requests.

Q. What kinds of offsets can insurance companies take?

A. As noted above, the most common types of offsets are Social Security disability benefits, worker's compensation benefits, and state disability program benefits. However, there are many other kinds of benefits that can be offset as well. Among these are retirement or pension benefits (including disability pension benefits), and other group and individual insurance benefits. Every policy is different, so you should read yours carefully to see which offsets apply to you and how they apply.

Q. What if I'm still working on a part-time basis? Are insurance companies allowed to offset my benefit?

A. Yes; this is usually called "partial disability" or "residual disability." If you are able to work in a part-time capacity, insurers are allowed to offset your disability benefit for this reason. Each insurance policy has a different method of calculating the amount of this offset. Usually the calculation is based on how much you are working and/or what your earnings are, so read your policy carefully to see how your benefit should be calculated.

Q. Can offsets be applied to payments that family members receive or are entitled to?

A. Usually no. Most policies limit offsets only to those benefits you personally are entitled to receive for your disability. One important exception is family Social Security benefits, or "dependent benefits." These are benefits to which your dependent children are entitled when you are receiving Social Security disability benefits. Very often policies will contain an offset for both types of Social Security benefits – your individual disability benefit as well as dependent benefits. This is permitted. Not all policies offset for dependent benefits, however, so read your policy carefully.

However, even reading your policy carefully may not answer your question. For example, one major insurance carrier has language in its policies offsetting other benefits received for "loss of time" at work. While primary Social Security benefits paid to a disabled adult are for "loss of time," the benefits paid to

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their eligible dependants are arguably NOT for “loss of time.” A Federal Court has ruled that when such language is in a policy, dependant Social Security Benefits may not be offset. You may need an experienced ERISA attorney to assist you in convincing the insurance company that the other income at issue may not be offset against your long-term disability benefit.

Q. Worker’s compensation benefits are designed to compensate injured workers for several different things: replacement of wages, loss of use, and medical treatment, among other things. If I receive worker’s compensation benefits, can the insurer offset all of my worker’s compensation benefits, even if they are not attributed specifically to lost wages?

A. Sometimes. This issue is currently in a gray area in the law. There is a strong argument that insurance companies should not be allowed to offset the part of your worker’s compensation benefit that is not attributable to wage replacement. Under this argument, it would be permissible for an insurer to offset your “temporary total disability” benefits, because these benefits are typically based on your prior salary. After you have become “permanent and stationary,” the insurer would not be allowed to offset the full amount of your “permanent total disability” benefits, because these benefits include compensation for multiple injuries, as described above.

California has recently enacted an insurance regulation that reflects this rationale [10 C.C.R. § 2232.45.4.]; it allows group disability insurers to offset temporary total disability benefits, but prohibits them from offsetting permanent total disability benefits. Again, the language of your policy is important. Some policies only allow offsets for benefits based on “loss of time,” while others are more broadly worded. This can be a confusing issue, so you should consult with your worker’s compensation attorney to ensure that your benefits are properly attributed to avoid being offset. If your worker’s compensation attorney is not fully equipped to protect your rights, you should insist that he or she consult with an ERISA attorney.

Q. I’m disabled because of an accident that someone else caused. I’m suing the responsible person. Can the insurance company offset my benefit by the payments I receive from the person who caused my disability?

A. Yes, to the extent the policy allows for such an offset. However, even if the policy language permits such an offset, that doesn’t automatically mean that your full recovery from the third party may be

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offset. The legal terms for this situation are referred to as either “subrogation,” or a “right of reimbursement.” They involve the “make whole” doctrine, which is a legal rule that says that if you are entitled to benefits from different sources for your injury – here, the person who caused the accident and the insurance company – the insurance company can only collect its offset, that is, enforce its “reimbursement rights,” if you have been “made whole” for your injury, or, in other words, you have been fully compensated for your injury.

If the person who caused your injury has limited assets, or no insurance, or insufficient insurance, you may not be fully compensated for your injuries. Even if you are fully compensated, it is likely that you will have hired an attorney to represent you in your lawsuit against the person who caused your injury. The attorney’s fee itself will then prevent you from being made whole. Some policies will claim a right to reimbursement of the full amount paid, even if your attorney received a third of the payment!

If your claim is governed by ERISA, there is currently a dispute in the law as to whether the “make whole” doctrine applies to your claim. In some states (such as California) the courts will apply the doctrine, but in others, they will not. If you are in this situation, you should consult with an attorney who specializes in ERISA law to determine whether the “make whole” doctrine applies to your claim, so you can limit the insurer’s rights.

Q. What happens if the offset amount is larger than my benefit amount?

A. Occasionally people are receiving benefits from several different sources, and the amount they are receiving from the other sources exceeds the benefit amount in their policy. For people in this situation, most policies have a minimum monthly benefit that is payable regardless of the total offset amount. Each policy calculates this benefit differently. Some policies have a set amount, such as $100; some set the amount as a percentage of your regular benefit; and some have a combination of the two. Some policies, however, do not have a minimum monthly benefit at all — insurers are not required to include one in their policies. Again, read your policy carefully.

Q. What if my other benefits go up? Can the insurance company increase the amount of its offset to keep pace with the increase in my other benefits?

A. Social Security disability benefits are the primary example here, as they adjust every year to

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compensate for the effect of inflation on fixed incomes. Some states, such as California, have laws that prevent insurance companies from reducing your benefit if your Social Security disability benefit goes up. [Cal. Ins. Code § 10127.1] Even if there is no law prohibiting an insurer from reducing your benefit, insurance policies will often contain a provision stating that the insurer will not do so. As always, read your policy carefully to see if the insurer can reduce your benefit if your other benefits go up.

Q. Can an insurance company estimate other income benefits to which I might be entitled and offset those amounts from my regular benefit, even though I haven't received them yet?

A. Sometimes. Insurance policies often purport to give insurers the right to make these kinds of estimates, especially with regard to Social Security disability benefits, which are usually easy to calculate. Sometimes insurers will give claimants a choice. An insurer will ask a claimant if the claimant wants the company to estimate the other benefit and apply the offset now, or whether the claimant wants to wait until he or she receives the other benefit and pay the insurer back.

Some states, however, prohibit certain kinds of estimates. For example, in California, group disability insurers are not allowed to estimate retirement benefits [10 C.C.R. § 2232.45.2], or worker's compensation temporary total disability benefits [10 C.C.R. § 2232.45.3], and therefore may not offset those kinds of benefits until they are actually received by the claimant. If you have a question regarding whether your insurer is allowed to estimate other benefits you haven't received yet, and offset them from your regular benefit, you should contact an attorney.

Q. If I think my insurance company is calculating my offsets incorrectly, what can I do about it?

A. If the insurance company approves your claim for benefits, it will often explain in its letter how your benefit has been calculated. If the insurer does not do so, or if you are concerned that your benefit has been miscalculated, you should request a detailed calculation in writing from the insurer. If your benefits are governed by ERISA, you have the right to question the insurance company's calculation, and insist they reconsider either their right to offset other income, or to reconsider their calculations.

If the reconsideration results in what you believe to be an incorrect determination, you have the right to bring a lawsuit in federal court. To maximize your chances of succeeding, you should contact an attorney

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who specializes in ERISA law before going through the ERISA reconsideration process. ERISA imposes strict evidentiary limits, so if you do not present your best evidence and arguments during the appeals process, you may be prevented from doing so later when you get to court. As a result, it is important to obtain legal advice from an attorney experienced in disability policies and, if applicable, ERISA, as early in the process as possible.

Q: Are there offsets in individual, non-ERISA disability policies?

A: Very rarely for "other income." Individual policies often have residual or partial disability provisions that offset earned income.

For example, let's say someone is making $100,000 with a 60% benefit. After having been on total disability, they return to work half time, earning $50,000. During the first year they will only offset the earned income to the extent it results in a total benefit plus earned income that exceeds pre-disability income. $60K + $50K = $110K, so they would offset $10K during the first year.

After that, typically they will figure out your percentage loss of income, and pay you that percentage of your benefit. In the above case, the loss of earned income is 50%, so they pay 50% of the $60,000 benefit, or $30,000.00. The insured is now getting a total of $80K for working only half time, but the carrier is getting to reduce its obligation to the insured by 50%. It is kind of a win win. Both sides get something out of it.

Some policies, however, take a dollar for dollar offset, but that is rare as it gives the insured NO incentive to try and return to work, so they don't try. There are dozens of variations of offsets for part-time work.

Q: Is group policy offsetting permissible for private disability income benefits?

A: Very few insurers try it, and there is a California insurance code that prohibits coordinating benefits between group and individual HEALTH benefits. It has been used to argue against coordination (which is basically offsetting by another name) of group and individual disability.

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