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ERISA Plan Fiduciaries: Death Of The Substantial Compliance Doctrine?

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In *Halo v. Yale Health Plan*, decided in April of 2016, the Second Circuit expressly rejected the "substantial compliance" doctrine with respect to alleged violations of the ERISA Claims Procedure regulation. Instead, the Court held that, in order to preserve otherwise properly reserved discretionary authority, the decisionmaker must demonstrate that any deviation from the requirements of the regulation in the processing of a particular claim was "inadvertent and harmless," and that the plan's claim and appeal procedures were otherwise fully compliant with the regulation.

District courts within the Second Circuit have issued numerous decisions interpreting Halo since then, but none have been as harsh as a recent decision issued by the Southern District of New York on February 28, 2017. *Salisbury v. Prudential Ins. Co. of Am.*, 2017 U.S. Dist. LEXIS 27983 (S.D.N.Y. Feb. 28, 2017). In that decision, the court held de novo review was required under the Halo standard, even though the decisionmaker's determination was otherwise timely. The court reasoned the claim administrator's letter, which advised the claimant that it was invoking the regulation's 45-day extension for issuing appeal determinations "to allow for review of the information in [the claimant's] file which remains under physician and vocational review," did not sufficiently specify the "special circumstances" necessitating the extension as required by the regulation. In reaching this conclusion, the court recognized the result "may appear harsh," but found that Second Circuit law requires "strict compliance" with the Claims Procedure regulation. While the insurer-defendant explained to the court that the extension was needed because the claim file was "voluminous, containing 4,623 pages of medical records and several days of surveillance," the court held this explanation came too late.

The days of the substantial compliance doctrine thus appear to be at an end in the Second Circuit. But plan fiduciaries expecting to rest easy, because their ERISA disability benefits litigations are likely to arise elsewhere, should think again. On December 16, 2016, the DOL issued final revisions to the Claims Procedure regulation that, among other mischief, provide as follows regarding disability claims: "if the plan fails to strictly adhere to all the requirements of this section with respect to a claim, … the claim or appeal is deemed denied on review without the exercise of discretion by an appropriate fiduciary." As if this language were not enough to put the final nail in the coffin of the

substantial compliance doctrine for disability claims, the same provision goes on to explain that loss of deferential review is prevented only by "de minimis violations that do not cause, and are not likely to cause, prejudice or harm to the claimant so long as the plan demonstrates that the violation was for good cause or due to matters beyond the control of the plan and that the violation occurred in the context of an ongoing, good faith exchange of information between the plan and the claimant." Note that the burden is upon the decisionmaker to prove violations were "de minimis." This particular provision of the final revised regulation, along with certain other new provisions, is slated to become effective for disability claims filed on or after January 1, 2018. Despite President Trump's Executive Order of January 20, 2017, which placed regulations published, but first effective on or after January 20, 2017, on administrative hold for sixty days pending further consideration, we are aware of no indication from the Department of Labor that any sections of the revised Claims Procedure regulation that have a delayed effective date are under any kind of review.

Accordingly, plan fiduciaries can likely expect courts all over the country to increase scrutiny of administrators' claim handling procedures, especially with respect to disability claims. Therefore, we recommend plan administrators and third-party administrators audit their claim handling procedures to ensure compliance with the regulation's requirements. Regarding requirements for invoking decision deadline extensions, we offer the following suggested guidelines:

- Requests for extensions of determination deadlines should be the exception, not the rule, especially for appeal decisions.
- Letters notifying claimants of an extension should explain:
    - why more time is needed,
    - why the need for more time is beyond the control of the decisionmaker,
    - a description of any unusual difficulties with the claim,
    - if the delay is because the claimant needs to submit additional information, the date established by the decisionmaker for furnishing such requested information, and
    - the date by which the decisionmaker expects to make a decision.
- When a claim determination is delayed by the need for additional information from the claimant, notify the claimant that the determination deadline has been suspended (tolled) from the date of the extension notification to the claimant to the earlier of:
    - The date on which a response from the claimant is received by the plan, or
    - The date established by the decisionmaker for the furnishing of the requested information, which should be at least 45 days, but advising that an additional reasonable amount of time will be granted provided the claimant so requests.
- Consider including a description of the appeals process with each notification sent to claimants.

Just how the courts will apply the provisions of the revised regulation regarding determination deadline extensions remains to be seen (except probably for the courts within the Second Circuit, which already has a position similar to the new regulatory requirements). The new sections of the regulation, overall, reflect a clear intent by the DOL to force courts into an increased role as "substitute plan administrators" – a role courts have generally eschewed so far. *See Perry v. Simplicity Eng'g, Div. of Lukens Gen. Indus.*, 900 F.2d 963, 966 (6th Cir. 1990) ("Nothing in the legislative history suggests that Congress intended that federal district courts would function as substitute plan administrators."). Following the above suggestions should at least provide a reluctant court with plausible grounds for avoiding the role of substitute plan administrator in spite of the revised regulation.

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