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No More Delays! New Disability Claims Rules to Take Effect April 2, Says DOL

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On April 2, 2018, significant changes to ERISA's disability claims procedures will take effect. These new rules will require all ERISA-covered plans which provide disability benefits to make significant modifications to the way disability benefit claims are reviewed and decided. This post describes what is changing and why, and the steps employers must take now to ensure compliance.

On December 19, 2016, the Department of Labor (DOL) issued final rules changing the claims review process for benefits under plans which provide disability benefits and are covered by the Employees Retirement Income Security Act of 1974 (ERISA). The rules were initially scheduled to take effect for claims filed on or after January 1, 2018, but the effective date was delayed for 90 days to cover claims filed after April 1, 2018. While many stakeholders had hoped for a further delay or outright withdrawal of these new regulations, the DOL announced on January 5 that it would be sticking with the April 2 effective date.

What Happened?

All ERISA-covered plans are required by Section 503 of ERISA to have claims procedures which provide for a full and fair review of claims. Regulations issued under ERISA Section 503 contain detailed direction as to the claims process, including timeframes, notice requirements, notice content, and qualifications for claims reviewers. Claims under group health plans and disability plans have historically been held to higher standards under these regulations. But in 2010, under the Affordable Care Act, the claims procedures for group health plans were enhanced significantly, while procedures for disability plans were unchanged.

In recent years, the DOL has recognized a need to enhance the disability regulations as well. In particular, the DOL reviewed ERISA litigation and found that the whopping majority of ERISA plan litigation arose from long-term disability claims. In addition, the DOL's ERISA Advisory Council recommended a review and enhancement of claims procedures. Based on these and other inputs, the DOL proposed on November 18, 2015, and then finalized on December 19, 2015, regulations updating the disability claims regulations to add additional protections for disability plan participants.

New Rules!? What's Changing?

The revised rules now include the following new protections for claimants, which in many cases are similar to those added for group health plans under the Affordable Care Act.

- Claim denial notices must contain a number of new elements, including:
    - An explanation as to why the plan disagreed with the views of (1) a health care or vocational professionals who evaluated the claimant or advised the Plan or (2) a disability determination of the Social Security Administration;
    - If a denial is based on a medical necessity or experimental treatment or similar exclusion or limit, either an explanation of the scientific or clinical judgment for the determination or a statement that such explanation will be provided free of charge upon request;
    - Either the specific internal rules, guidelines, protocols, standards or other similar criteria of the plan relied upon in denying the claim or, alternatively, a statement that such rules, guidelines, protocols, standards or other similar criteria of the plan do not exist;
    - A statement that the claimant is entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the claim;
    - If the denial is a final internal denial, a statement of the claimant's right to bring an action under section 502(a) of ERISA; this statement must include a description of any applicable contractual limitations period that applies to the claimant's right to bring such an action, including the calendar date on which the contractual limitations period expires for the claim.
- Denial notices must be provided in a culturally and linguistically appropriate manner.
- A retroactive cancellation of disability coverage must be treated as a claim denial, unless it is attributable to a failure to timely pay required premiums or contributions towards the cost of coverage.
- The plan's decisions regarding hiring, compensation, termination, promotion, or other similar matters with respect to any individual (such as a claims adjudicator or medical or vocational expert) must not be made based upon the likelihood that the individual will support a denial of benefits.
- Before the plan can deny a claim appeal, the plan administrator must provide the claimant, free of charge, with any new or additional evidence considered, relied upon, or generated by the plan, insurer, or other person making the benefit determination (or at the direction of the plan, insurer or such other person) in connection with the claim; such evidence must be provided as soon as possible and sufficiently in advance of the date on which the notice of the decision is required to be provided to give the claimant a reasonable opportunity to respond prior to that date.
- Before the plan can deny a claim appeal based on a new or additional rationale, the plan administrator shall provide the claimant, free of charge, with the rationale; the rationale must

be provided as soon as possible and sufficiently in advance of the date on which the notice of the decision is required to be provided to give the claimant a reasonable opportunity to respond prior to that date.

- If the Plan fails to strictly adhere to these internal claims procedures, the claimant is deemed to have exhausted the administrative remedies available under the plan and may proceed to litigation, except for certain de minimis violations.

What should employers be doing?

Given that the April 2 effective date is fast approaching, employers should be taking several steps to make sure all ERISA covered plans that provide disability benefits are in compliance with these new rules.

1. Identify all ERISA-covered plans sponsored by the employer that provide disability benefits. While long term disability (LTD) plans are typically subject to ERISA, short-term disability (STD) plans may or may not be subject to ERISA. STD plans are potentially exempt from ERISA as “payroll practices”, but much depends on the various features of the STD plan. In addition, some retirement plans have disability-based provisions and could be caught up in the new rules.

2. Confirm that all ERISA-covered plans that provide disability benefits have updated claims procedures in effect on April 2. Note that the procedures should be in writing and ready to be implemented by this date. This may entail a review of internal processes or a call to disability providers.

3. Update summary plan descriptions (SPDs) to include the new procedures, and distribute the revised SPDs.

Conclusion

The new disability claims regulations contain a variety of new requirements for ERISA plans, and the April 2 effective date is fast approaching. Based on the DOL’s latest announcement, it seems unlikely that these new regulations will be withdrawn, revised, or further delayed. Employers are urged to take action immediately.

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