Legal Update Article

Changes to ERISA's Disability Claims Regulations Coming April 1

January 31, 2018

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New handling regulations for ERISA disability claims will go into effect on April 1, 2018, the Department of Labor (DOL) has announced. The agency confirmed that the regulations are final, without changes.

The regulations were effective January 2017, but weredelayed until April 1, 2018. The DOL has confirmed they will not be delayed or revised further.

Employers who offer short-term and long-term disability plans governed by ERISA (and their plan administrators) need to prepare for the approaching deadline. This article provides background on the flux of the regulations and offers steps to take now to ensure timely compliance.

Background

Like a few of the DOL's regulations in the past year, ERISA disability claims handling regulations were caught up in the change of White House administration. The DOL initially published the final regulations (Final Rule) on December 19, 2016. The Final Rule revised the claims procedure rules for ERISA-covered employee disability benefit plans. It was made effective January 18, 2017, with a delayed applicability until January 1, 2018, in order to provide adequate time for disability benefit plans, employers, and third party administrators (TPAs) to understand the changes and adjust disability claims administration processes, notifications, plan language, and claim filing systems.

On February 24, 2017, President Donald Trump issued Executive Order 13777 ("E.O. 13777") with the intent of reducing the regulatory burden. A Regulatory Reform Task Force was directed to evaluate existing regulations and make recommendations regarding regulations that can be repealed, replaced, or modified to make them less burdensome.

As a result of E.O. 13777, certain stakeholders wrote the DOL, claiming the Final Rule will drive up disability benefit plan costs, cause an increase in litigation, and, consequently, impair workers' access to disability insurance protections. Subsequently, in the summer of 2017, the DOL announced that it would revisit the Final Rule. On October 12, 2017, the DOL issued a Notice of Proposed Rulemaking (NPRM) proposing a 90-day delay to the Final Rule's applicability date and providing the public and stakeholders an additional opportunity to submit comments and data concerning the potential impact of the ERISA disability claims regulations.

Throughout the second half of 2017, employers, plan administrators, and TPAs were in limbo about whether, or to what extent, to implement ERISA's regulatory changes.

Action Items for Employers, Plan Administrators, and TPAs

The following are provisions in the Final Rule and actions employers should consider, if applicable:

- *Conflict of interest criteria:*The regulations add specifics on the impartiality and

independence of claims adjudicators, service providers, and vendors.

► *Action item:* Double check that vendor contracts (including those with medical and vocational experts) and employment relationships do not tie financial incentives and employment decisions to claim outcomes, such as providing bonuses for denied claims.

- *Expanded benefit denial notice information:* This requires benefit denial notices to expand upon the reasons and criteria relied upon when denying benefits, including a detailed explanation for disagreeing with the claimant's treating physician or a Social Security Administration determination.

  ► *Action item:* Ensure that internal plan administrators or TPAs have the required information in any adverse benefit notification (a/k/a denial letter) that are sent to employees.

- *Provide claimant a right to review and respond* to new information (such as a physician review report or transferrable skills assessment) as soon as it is available and determined to be relied upon during the appeal process, and before an appeal-level denial is issued.

  ► *Action item:* Ensure the plan's appeal administration includes this process. The DOL did not change the 45-day deadline by which a plan must make a decision on an appeal request, so this additional step will put significant pressure on the decision deadline. If a claimant-employee receives the new information and wishes to rebut the information, it may be prudent, in certain circumstances, to allow the claimant an extension of time to provide rebuttal information and the plan administrator to review the employee's response.

- *Consequences* if the plan does not establish or adhere to claims processing rules or if plans are retroactively rescinded. If a disability plan is retroactively rescinded, the plan's appeals process is triggered immediately. Claimants can skip the plan's claims procedures (including the appeal process) if the plan administrator does not follow those procedures. If a claimant requests an explanation for why a plan failed to follow the plan's claims procedures, the plan administrator must respond in writing in 10 days.

  ► *Action item:* In order to minimize litigation risk, ensure the plan administration process is always followed and that any minor deviation is noted with sufficient explanation in the claim filed. If a plan administrator receives a request from the claimant or his or her representative to explain why the plan's claims process was not followed, the employer should consider emphasizing to the administrator the importance of providing a timely written response. Employers and plan administrators should agree upon the response process, including who will provide the written response. If possible, employers should avoid rescinding plans retroactively.

- *Non-English language notices:* The plan must make translation services available to certain claimants who speak languages other than English. This includes oral language services to assist with claim and appeal filing, translated notices upon request, and information to claimants about how to receive these language services. If a claimant's address is in a county where at least 10 percent of the population is literate only in the same non-English language, denial letters must include a prominent statement in that

non-English language about the availability of translation services. The plan must provide a copy of the applicable letter or notice in that language upon the claimant's request.

► *Action item:* Check with plan administrator to ensure a translation vendor is available for both oral and written translations, and negotiate the cost of the service. In addition, employers should provide plan administrators with employee census information. This allows the administrator to determine if a claimant's address is in a county that requires the translated language service notifications. The DOL provides county information on its website.

- *Contractual limitations period:* If the plan sets forth a limitation period in which the claimant can bring suit for a denial of benefits, then the benefit denial notification must include a description of the contractual limitations period and the actual calendar expiration date.

  ► *Action items:* Limitation language is recommended in disability plans. Without this language, courts will rely on state law. Employers need to make sure any limitation to filing suit is calculable to an exact deadline, because that date must be provided to a claimant whose claim for benefits is denied at the final appeal level.

More information on the Final Rule, including our complimentary webinar, can be found here. The DOL's fact sheet also provides further information.

Jackson Lewis attorneys are available to assist employers, plan administrators, and TPAs to ensure compliance with the Final Rule by April 1st.

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