SEYFARTH SHAW

Management Alert

DOL's New Disability Plan Claims Regulations to Become Effective

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The Department of Labor's new regulations governing disability claims and appeals published on December 19, 2016 will go into effect on April 1, 2018, as announced by the DOL on January 5, 2018.

The stated purpose of the new regulations is to strengthen the current disability claims rules under ERISA primarily by adopting certain procedural protections and safeguards applicable to group health plans under the Affordable Care Act. The new regulations were originally effective as of January 18, 2017, but were intended to apply only to disability claims filed on or after January 1, 2018. After a short delay by the DOL, the regulations now will apply to claims filed on or after April 1, 2018. The DOL announced that comments received during the delay did not establish that their "final rule imposes unnecessary regulatory burdens or significantly impairs workers' access to disability insurance benefits." This clearly establishes the April 1, 2018 effective date and there is unlikely to be another extension.

What Do the Final Rules Require?

The final regulations make several substantive changes to the existing regulations applicable to disability claims and appeals:

- To ensure the independence and impartiality of claims and appeals decision-makers, any decisions regarding hiring, compensation, termination, promotion, or other similar matters with respect to any individual (such as a claims adjudicator or medical expert) must not be made based on the likelihood that the individual will support a denial of benefits.
- Adverse benefit determinations must:
  - Include a discussion of the decision, with the basis for disagreeing with the views or decisions of any treating health care professionals, vocational experts, or other payers of benefit who granted the claimant's similar claims (including disability determinations by the SSA);
  - Include the plan's specific internal rules, guidelines, protocols, standards, or other similar criteria relied upon in making the adverse determination or, alternatively, a statement that such plan rules, guidelines, protocols, standards or other similar criteria do not exist;
  - Include 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 (previously, this statement was only required for adverse determinations at the appeals stage);

- Be provided in a culturally and linguistically appropriate manner; and
- Describe (in addition to the claimant's right to bring an action under ERISA §502(a)) any applicable contractual limitation period that applies to the claimant's right to bring such an action, including the calendar date on which the contractual limitations period expires.

- A plan's disability claims procedures must:
  - Allow a claimant to review the claim file and present evidence and testimony as part of the claims and appeals process;
  - Provide that the plan administrator shall provide the claimant, free of charge, with any new or additional evidence considered, relied upon, or generated by the plan (or at the direction of the plan) 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 adverse benefit determination on review is required to give the claimant a reasonable opportunity to respond before that date; and
  - Provide that before a plan administrator can issue an adverse benefit determination on review based on a new or additional rationale, the plan administrator must provide the claimant, free of charge, with the rationale. Such rationale must be provided as soon as possible and sufficiently *in advance* of the date on which the notice of adverse benefit determination on review is required to give the claimant a reasonable opportunity to respond before that date.
- Failure to establish or follow claims procedures consistent with the new (and existing) requirements will result in the claimant being deemed to have exhausted the administrative remedies under the Plan and entitled to pursue any available remedies under ERISA §502(a). When this occurs, the claim or appeal will be deemed to have been denied on review without the plan fiduciary exercising any discretion, unless the violation is *de minimis*. *De minimis* errors are those that:
  - Do not cause, or are not likely to cause, prejudice or harm to the claimant;
  - Were violations for good cause or due to matters beyond the control of the plan;
  - Occurred in the context of an ongoing, good faith exchange of information between the plan and claimant; or
  - Are not part of a pattern or practice of violations by the plan.

In the event of any error, the claimant may request a written explanation from the plan, including a specific description of the plan's bases, if any, for asserting that the error is *de minimis* and should not result in deemed exhausting of administrative remedies. The Plan must provide this written explanation, if requested, within 10 days. The claimant may then decide whether or not to pursue remedies under ERISA §502(a). If a court rejects a claimant's request for immediate review on the basis that the Plan's error was *de minimis*, the claim shall be considered as re-filed on appeal upon the Plan's receipt of the court's decision, and the plan must provide the claimant with notice of the resubmission within a reasonable period of time.

- The term "adverse benefit determination" will include any rescission of disability coverage with respect to a participant or beneficiary (whether or not, in connection with the rescission, there is an adverse effect on any particular benefit at that time.) For this purpose, rescission means a cancellation or discontinuance of coverage that has retroactive effect, except to the extent it is attributable to a failure to timely pay required premiums or contributions towards the cost of coverage.

Impact on Employee Benefit Plans

These regulations will change the manner in which disability claims and appeals are processed with respect to both disability welfare plans and retirement plans.

Welfare

If your long-term disability plan is fully insured, the insurer will be incorporating the new regulatory requirements into their processes. For those sponsors with self-funded long-term disability plans, the third party administrator will similarly have to modify its internal processes to incorporate the new regulations. (Note that short term disability plans are not generally subject to these regulations as they are typically an exempt payroll practice, not subject to ERISA.)

Retirement

Retirement plans may also be impacted by the final regulations if, upon a disability, the plan either pays a distribution in-service or vests accrued benefits. In these cases, a determination must be made as to whether the participant has incurred a disability within the meaning of the plan. Where the plan relies on a definition of disability as a determination made by the Social Security Administration or the plan sponsor's long-term disability insurer, then the retirement plan administrator does not have a concern. However, if the determination of disability resides with the retirement plan administrator, the retirement plan must be amended to reflect the standards in the new regulations and administration must also be adjusted accordingly.

Action Items:

- Employers who handle disability claims and appeals internally will need to re-evaluate their existing procedures and tailor them to the new requirements. Even employers who utilize third-party administrators for disability claims and appeals will need to work with their third-party administrators to ensure that any necessary changes are incorporated into existing procedures.
- All plan sponsors will need to review their plan documents and update as appropriate to reflect these new regulations.
- Plan administrators will need to ensure that summary plan descriptions reflect the new regulatory requirements.

If you have any questions, please contact Diane Dygert at ***ddygert@seyfarth.com*** or Brian W. Barrrett at ***bbarrett@seyfarth.com***.

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