

Trump Administration Proposes Delay to the New Disability Claims and Appeals Regulations

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Under the Obama Administration, the Department of Labor (“DOL”) issued final regulations imposing new requirements on employers regarding their handling of claims and appeals filed on or after January 1, 2018 for disability benefits offered under their employee benefit plans. With this effective date looming, the DOL published a proposed rule on October 12, 2017, extending the effective date of the new disability claims and appeals requirements to April 1, 2018.

Not only would the proposed rule delay the effective date for 90 days until April 1, 2018, but the proposed rule could result in rescission or modification of the final regulations. The DOL states in the proposed rule that certain stakeholders have asserted the final regulations would increase benefit costs, cause an increase in litigation, and impair workers’ ability to access disability coverage. For these reasons, the DOL concluded that the proposed rule was appropriate, as it provides the DOL with time to consider regulatory alternatives. Comments on the 90-day extension must be submitted to the DOL by October 27, 2017, while comments on rescinding, modifying or retaining the Final Regulations are due by December 11, 2017.

The final regulations, as currently drafted, impose additional requirements on fiduciaries of plans providing disability coverage in adjudicating claims and appeals. These regulations cover employer-sponsored short- and long-term disability plans, as well as retirement plans providing disability benefits where the plan fiduciary, rather than the disability insurer, makes the determination of disability. The new disability regulations, which are summarized below, impose additional disclosure requirements and address claimants’ right to review new information, treatment of coverage rescissions as adverse determinations, deemed exhaustion of remedies, and the independence and impartiality of the decision-making process.

The final regulations modify the disclosure requirements for notices of adverse determination for disability claims. Notices must contain, among other things:

- Discussion of the decision, including the basis for disagreeing with a determination by the Social Security Administration or other third party

disability payer, and any views of health care professionals treating a claimant.

- The internal rules, guidelines, protocols, and other similar criteria that were used to make the adverse determination or a statement that such criteria do not exist.

The final regulations require that:

- Before issuing an adverse benefit determination for disability benefits on review, a plan must provide claimants, free of charge, new or additional evidence considered, relied upon, or generated by the plan, insurer or other person making the benefit determination. A similar requirement applies to an adverse benefit determination based on a new or additional rationale.
- Plans provide the evidence or rationale as soon as possible and sufficiently in advance of the due date for the notice of adverse determination on review. Adverse benefit determinations for disability include rescission of disability benefits that has a retroactive effect, except due to a failure to timely pay required premiums or contributions toward the cost of coverage.

If a plan fails to satisfy the requirements, the claimant will be deemed to have exhausted administrative remedies, except where the violation was (i) de minimus, (ii) non-prejudicial, (iii) attributable to good cause or matters beyond the plan's control, (iv) in the context of an ongoing good faith exchange of information, and (v) not reflective of a pattern or practice of non-compliance.

Finally, the final regulations explicitly provide that plans must ensure that all claims and appeals for disability benefits are adjudicated in a manner designed to ensure the independence and impartiality of the persons involved in making the decision. Accordingly, decisions on hiring, compensation, termination, promotion, or similar matters with respect to any individual (such as a claims reviewer) must not be made based on the likelihood that the individual will support the denial of disability benefits.

Action Items for Plan Sponsors and Fiduciaries

At this time, it is not certain if the current version or an amended version of the final regulations will become effective on April 1, 2018. Due to this uncertainty, the sponsors and fiduciaries of plans providing disability benefits may consider delaying further work until guidance on the impact of the proposed rule becomes available.

If and when the final regulations become effective (whether in its current form or as amended or revised), plan sponsors and fiduciaries offering disability benefits will need to take the following steps:

- Review plan documents offering disability benefits to determine if amendments are required to the sections on claim and appeals.

- For claims filed after the effective date, ensure the process for reviewing claims and appeals complies with the final regulations. If the review is handled by an insurance company or third-party administrator, fiduciaries should confirm that the review will be compliant as of the applicable date. If claims and appeals are handled internally, fiduciaries may need to update their staff on the final regulations.
- Review summary plan descriptions and employee communications affecting their plans offering disability benefits to determine if revisions are needed or whether a summary of material modification should be issued.

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