

## A New Announcement Ends The Uncertainty About When The New Disability Claims Procedure Requirements Will Become Effective, And Requires Compliance By April 1, 2018

The United States Department of Labor (“DOL”) issued regulations in 2016 that made significant changes in the claims procedure requirements for employee benefit plans covered by the Employee Retirement Income Security Act (“ERISA”) that provide disability benefits (“New Disability Claims Requirements”), but delayed the effective date of the New Disability Claims Requirements until April 1, 2018 as it gathered additional information on whether the New Disability Claims Requirements should be modified or rescinded. On January 5, 2018, the DOL announced that the New Disability Claims Requirements will become effective in their current form for disability claims filed on or after April 1, 2018. This announcement ended widespread speculation about whether the DOL would further delay the effective date of the New Disability Claims Requirements, and possibly rescind the New Disability Claims Requirements. Employers with ERISA-covered plans with disability benefits (“ERISA Disability Benefit Plans”) should, if they have not already done so, amend the disability claims procedures in their ERISA Disability Benefit Plans no later than April 1, 2018.

### **Why Did the DOL Make a Final Decision To Implement the New Disability Claims Requirements On April 1, 2018?**

The DOL previously announced a delay in the effective date of the New Disability Claims Requirements until April 1, 2018, in order to allow commentators to submit comments and data on the merits of rescinding, modifying, or retaining the New Disability Claims Requirements. The DOL said it received approximately 200 comments from the insurance industry, employer groups, consumer advocates, and lawyers representing disability benefit claimants, and that the information submitted with those comments was not enough to justify a decision by the DOL to further delay or change the New Disability Claims Requirements. The DOL said the information received in those comments failed to support arguments that the New Disability Claims Requirements would:

- result in unnecessary regulatory burdens for employers; or
- significantly lessen the access of employees to disability insurance benefits.

The DOL said implementation of the New Disability Claims Requirements on April 1, 2018 will provide employees with “new procedural protections when dealing with plan fiduciaries and insurance providers who deny their claims for disability benefits.”

In our [November 2017 Employee Benefits Law Information Memo](#), we provided information about, among other things: (1) the types of plans that could be subject to the New Disability Claims Requirements; (2) a summary of some of the more important New Disability Claims Requirements; (3) a description of the reasons why it would be important for employers to implement the New Disability Claims Requirements if they became effective; and (4) the types of documents that should be changed if the New Disability Claims Requirements became effective. In order to assist employers with ERISA Disability Benefit Plans who have yet to amend those plans to comply with the New Disability Claims Requirements, that type of implementation information for the amendments that will need to be made appears below.

### **What Types of Plans Are Subject To the New Disability Claims Requirements?**

ERISA-covered retirement and welfare benefit plans that provide benefits if an individual becomes disabled generally will be

subject to the New Disability Claims Requirements. Certain government plans, church plans, and plans maintained solely for the purpose of complying with applicable workers' compensation law(s) and disability insurance law(s) are exempt from ERISA. Private employers and tax-exempt employers with ERISA Disability Benefit Plans generally will have to comply with the New Disability Claims Procedures. Examples of the types of non-governmental and non-church plans that could be subject to the New Disability Claims Requirements include:

- short-term disability benefit plans that provide benefits in excess of those required by applicable laws;
- long-term disability benefit plans;
- other welfare benefit plans that provide certain benefits if an individual becomes disabled (e.g., continued coverage under a health plan, or a waiver of a requirement to pay premiums under a life insurance plan);
- retirement plans that provide certain benefits if a participant becomes disabled; and
- nonqualified deferred compensation agreements or plans that provide certain benefits if a covered employee becomes disabled.

### **What Are the New Disability Claims Requirements?**

Among the more important New Disability Claims Requirements for the processing of claims and appeals for disability benefits under ERISA Disability Benefit Plans are the following:

- More Disclosure Requirements For Benefit Denials – If a disability benefit denial is going to be issued, it will have to include a more detailed explanation of: (1) the reasons why the benefit is being denied, (including, if applicable, the reason for any disagreement with the viewpoint of a medical or vocational professional, or with a disability determination by the Social Security Administration); and (2) the specific internal standards, rules, guidelines, protocols, or other similar criteria of the plan (collectively, “Standards”) that were used in making that denial (or an explanation that such Standards do not exist).
- A Benefit Denial Must Describe a Right To Request a Claim File – A benefit denial must include a statement that the claimant has the right, upon request, to receive a copy of the whole claim file and certain other documents that are relevant.
- An Appeal Denial May Not Be Based On New Information, Unless a Claimant Is First Allowed To Review and Respond To the New Information – If the denial of an appeal is going to be based on new evidence or a new rationale that was not in the initial benefit denial, the claimant must be notified about the new evidence or rationale free of charge and must be provided a fair opportunity to respond to it before the appeal is denied.
- Conflict of Interest Requirements For Individuals Involved In Claims and Appeals Decisions – Conflict of interest procedures must be followed by ERISA Disability Benefit Plans that generally will help ensure that certain individuals involved in claims and appeals decisions (e.g., individuals deciding claims, medical experts, and vocational experts) are independent and impartial. Such individuals may not, for example, be hired, compensated, promoted, or terminated based on how claims or appeals are handled.
- Certain Violations of the Claims Requirements Could Allow a Claimant To Immediately Go To Court – Certain violations of the benefit claims requirements could constitute a deemed exhaustion of administrative remedies that would allow a claimant to immediately go to court to challenge a denial of disability benefits.
- Certain Rescissions of Coverage Will Be Treated As a Benefit Denial – Certain rescissions of coverage by a plan (e.g., a retroactive termination of coverage due to a false statement made on an application for coverage) will be treated as a benefit denial that will require the claims procedure requirements to be followed.

- Denial and Appeal Communications May, In Certain Circumstances, Have To Be Provided In Non-English Languages – If a claimant for disability benefits lives in a county where 10 percent or more of the population is only literate in a non-English language, benefit denials will have to include a statement in the applicable non-English language that certain language services will be available upon a claimant's request to assist with the processing of the claim.

### **Why Is It Important For Employers To Implement the New Disability Claims Requirements?**

Employers with ERISA Disability Benefit Plans will want to timely amend each such plan to incorporate the New Disability Claims Requirements in order to help ensure a favorable judicial standard of review if the disability claim is ever litigated. Certain failures to follow ERISA's benefits claims procedure requirements could:

- allow a claimant to start litigating a claim in federal court before having to exhaust the plan's administrative remedies (i.e., before have to comply with all of the applicable requirements of the plan's benefit claims procedures); and
- allow a federal court to review the merits of the claim without having to give deference to any decision or interpretation made by the claims administrator with respect to the claim.

Timely implementation of the New Disability Claims Requirements could, therefore, increase an employer's chances to prevail on disputed claims for disability benefits in an ERISA-covered plan.

### **What Documents Should Be Changed Before the New Disability Claims Requirements Become Effective?**

Employers with ERISA Disability Benefit Plans should make any changes in the benefit claims procedures for those plans that are needed to comply with the New Disability Claims Requirements. Documents where such changes may need to be made include:

- the plan document;
- the summary plan description for the plan; and
- any other document that references the plan's benefit claims procedures (e.g., some nonqualified deferred compensation agreements have benefit claims procedures in a separate document).

If you have any questions about this memorandum, please contact [Ted Lewkowicz](#), any of the [attorneys](#) in our [Employee Benefits and Executive Compensation Practice](#), or the attorney in the firm with whom you are regularly in contact.

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