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New Disability Claims Procedures Not an April Fools' Joke; Changes to ERISA Regulations Applicable April 1

March 30, 2018

Earlier this year the US Department of Labor ("DOL") announced that regulations specifying new procedural requirements for administration of disability benefits claims under plans that are subject to the Employee Retirement Income Security Act of 1974 ("ERISA") will apply to claims that are filed after April 1, 2018. The new regulations are modeled after the external review processes required under the Affordable Care Act and intended to promote fairness and accuracy in the claims review process and protect participants and beneficiaries.

While operational compliance with these new requirements is required immediately with respect to any such claim that is filed after April 1, 2018, amendments to plan documents and related participant disclosures regarding the updated rules are not required until July 29, 2019, except with respect to affected tax qualified retirement plans, which must be amended, if necessary, no later than December 31, 2018. The new operational compliance requirements do not require any additional steps to be taken by the claims administrator where the claim for disability benefits is approved in full (and the claimant is not required to submit an appeal or other response to a denial notification before such approval).

What are the new disability claims procedural requirements?

The new regulations provide additional protections for the claimants of disability benefits (and related burdens on plan sponsors and claims administrators). These new requirements include:

- Notifying claimants regarding any additional information that will be relied upon by the claims administrator in denying a claim on appeal as a pre-requisite to making such denial and sufficiently in advance to permit the claimant an opportunity to first respond before the denial is issued.
- Providing additional information in initial claim denial notices and notices of denial of appeal.
- Ensuring claims are adjudicated by persons who are independent and impartial (e.g., claims administrators cannot be hired or receive additional compensation based on the likelihood such persons will support denial of a claim).
- Providing non-English disclosures and other translation services to claimants who are provided notices of claim denial and reside in a county where 10% or more of the population are literate only in the same non-English language.

What plans are subject to the new requirements?

An ERISA plan will be subject to these new requirements if:

- a claimant's qualifying disabled status triggers eligibility for a benefit, including a benefit distribution or accelerated benefit vesting, and
- the plan's definition of disability involves a determination of disabled status by either the plan sponsor or the plan sponsor's administrator or agent (instead of an independent determination by the Social Security Administration, a long-term disability

insurance carrier, or other third-party "payer" of disability benefits).[1]

Types of ERISA plans that could be subject to the new requirements include:

- health and welfare plans (e.g., major medical and disability plans),
- severance plans that pay benefits upon a disability (not severance plans that provide benefits on account of an involuntary termination that is defined to exclude terminations on account of disability),
- tax qualified retirement plans (e.g., 401(k) plans, profit-sharing plans, defined benefit pension plans), and
- "top-hat" nonqualified deferred compensation plans that pay benefits upon a disability.

What should plan sponsors do now?

Ensure operational compliance. Plan sponsors should ensure that any disability benefit claims filed after April 1, 2018 under plans subject to the new requirements are administered in compliance with the new rules, including verifying compliance by any third-party claims administrators in handling claims where any denial notification may or will be sent to the claimant. Plan sponsors should also verify that their disability claims administrators are independent and impartial (e.g., were not hired and do not receive additional compensation based on the likelihood such persons will support denial of a claim).

Prepare for documentary compliance. Plan sponsors should coordinate with their plan providers to identify plans subject to the new requirements and the applicable deadlines for preparing and adopting amendments and communicating changes to the participants. Alternatively, plan sponsors may want to consider the feasibility of amending the definition of disability to require (subject to certain legal restrictions) a determination by the Social Security Administration or the sponsor's long-term disability insurance carrier as an alternative to the determination being made by the plan sponsor or its agent, which would exempt the plan from these new procedural requirements.

What are the key dates?

- April 1, 2018 – Any disability claim filed after April 1, 2018 must be administered in strict compliance with the new claims procedures (even if the plan document and summary plan description (SPD) are not yet updated to include the new procedures).
- December 31, 2018 – Tax qualified retirement plan amendments, if needed, must be applicable as of April 1, 2018 and adopted no later than December 31, 2018 (tax qualified retirement plan regulations generally require any amendment to the plan's terms to be adopted no later than the end of the year in which it becomes effective).
- July 29, 2019 – An updated summary plan description (SPD) or summary of material modifications (SMM) to the SPD reflecting the new procedures for disability benefit claims filed after April 1, 2018 must be prepared and distributed to eligible plan participants no later than July 29, 2019. This is the same deadline typically applicable for communicating changes in the plan terms to participants (i.e., no later than 210 days following the end of the year in which the change became effective). However, the DOL generally recommends providing participants with the updated claims procedure (via a SMM or updated SPD) as soon as possible to inform participants of the new procedures.
- July 29, 2019 – Any necessary amendments to plan documents (other than tax qualified retirement plans; see above) should be adopted at the same time as the updated SPD or SMM (no later than July 29, 2019) and applicable as of April 1, 2018.

What happens if a plan fails to comply with the new rules?

Unless the failure is deemed "de minimis" under the new rules[2], a claimant who has received a denial of benefits or other adverse determination is deemed to have already exhausted the internal administrative remedies available under the plan such that the claimant can immediately proceed to file a civil lawsuit. Additionally, the plan will not receive the benefit of the deferential "arbitrary

or capricious" standard of review of the claims administrator's decision which would otherwise have applied under ERISA if the lawsuit had been brought following exhaustion of the plan's claims procedures.

If you have any questions about this alert, please do not hesitate to contact one of the attorneys listed here.

Notes

1. Even if a plan's definition of disability refers to a definition in the Internal Revenue Code (such as Section 22(e)(3)), a disability determination still must be made by the plan sponsor or the plan sponsor's administrator or agent. The referenced statutory definition is considered only to set forth the standard for making the determination.
2. A failure is de minimis if it (i) does not cause, and is not likely to cause, prejudice or harm to the claimant, (ii) was for good cause or due to matters beyond the control of the plan, (iii) occurred in the context of an ongoing, good faith exchange of information between the plan and the claimant, and (iv) is not part of a pattern or practice of violations by the plan. Upon request, a claimant is entitled to receive within 10 days a written explanation from the plan of the specific reasons a failure is considered to be de minimis.

Key Contacts

Tom Reicher San Francisco	treicher@cooley.com +1 415 693 2381
David Walsh Reston	dwalsh@cooley.com +1 703 456 8021
Thomas Welk San Diego	twelk@cooley.com +1 858 550 6016

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