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Companies which Sponsor Employee Disability Benefit Plans May Need to Take Immediate Action to Comply with New Regulations

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Introduction

The Department of Labor (“DOL”) has announced that the revised claim and appeal procedure regulations under the Employment Retirement Income Security Act of 1974 (“ERISA”) for employee benefit plans providing disability benefits will soon take effect. The enhanced rules primarily adopt procedural protections and safeguards for disability benefit claims that are currently applicable to claims for group health benefits pursuant to the Patient Protection and Affordable Care Act. As a result, plan administrators of employee benefit plans subject to ERISA will need to quickly act to ensure compliance with the enhanced rules.

Effective Date of Rules

The enhanced rules apply to all claims for disability benefits subject to ERISA filed on or after April 1, 2018.

Applicable Benefit Plans

The enhanced rules apply to any “disability” benefit subject to ERISA. According to the DOL, a benefit is a “disability” benefit if the plan conditions availability to the claimant upon a showing of a disability, regardless of how the plan characterizes the benefit. Of note, if a plan provides for the availability of a benefit conditioned on a finding of disability, but the finding is made by a party outside of the plan (such as the Social Security Administration), then the disability claims procedures do not apply.

As a result, the enhanced rules might apply to the following benefit programs subject to ERISA:

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- Long-term disability coverage;
- Short-term disability coverage (unless the coverage is an exempt payroll practice);
- “Top hat” non-qualified deferred compensation programs; and
- Retirement benefits.

Summary of Changes

The enhanced rules primarily adopt procedural protections and safeguards for disability benefit claims that are currently applicable to claims for group health benefits pursuant to the Patient Protection and Affordable Care Act. In summary:

- *Independence and impartiality* – Decisions regarding hiring, compensation, termination, promotion, or other similar matters must not be made based upon the likelihood the individual will support a denial of disability benefits.
- *Rescissions* – An “adverse benefit determination” will also include rescissions of disability coverage.
- *Additional disclosure requirements* – Adverse benefit determinations will need to include, amongst other items, a discussion of the decision.
- *Right to review and respond to new information before final decision* – a claimant must be provided, and have the ability to respond to, any new or additional evidence or rationale used in coming to a final decision.
- *Notice requirements* – Any notice relating to a claim for disability benefits must be issued in a culturally and linguistically appropriate manner for certain non-English languages (i.e., counties wherein 10% or more of the population is literate only in the same non-English language). As a result, if the population standard applies, oral language services must be available, non-English language notices must be provided upon request, and English language notices must include a statement in the applicable non-English language indicating how to access the available language services.
- *Deemed exhaustion* – Unless the error is de minimis and does not (or is not likely to) cause prejudice or harm and is made in good faith, a failure by the plan to strictly adhere to the requirements for deciding a claim for disability benefit will constitute exhaustion of administrative remedies. As a result, the claimant may pursue any available remedies under ERISA.

Action Items

For non-insured benefit programs, the plan administrator should update its disability claims procedures accordingly. If a third party administrator provides claims and appeals assistance to the non-insured benefit program, the plan administrator should consult with the third party administrator to confirm compliance (updating any service contracts if necessary).

For insured benefit programs, the plan administrator should contact the applicable insurance carrier to confirm delivery of revised policies and certificates outlining the new enhanced rules, and to confirm compliance.

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