

What Should Employers Do About the Delay In the New Disability Claims Procedure Requirements?

On November 24, 2017, the United States Department of Labor (“DOL”) announced a 90-day delay in the effective date of regulations that will significantly change 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”). The New Disability Claims Requirements are now scheduled to become effective for disability claims filed after April 1, 2018, as opposed to the current requirement of becoming effective for disability claims filed on or after January 1, 2018. This change gives employers an additional 90 days to modify the disability claims procedures in their ERISA-covered plans with disability benefits (“ERISA Disability Benefit Plans”). It is also possible that prior to April 1, 2018 the DOL could further delay the April 1, 2018 effective date of the New Disability Claims Requirements, and/or modify or rescind the New Disability Claims Requirements.

This uncertainty over the future of the New Disability Claims Requirements raises questions about how employers with ERISA Disability Benefit Plans should proceed:

- Employers That Have Already Made the Changes To Comply With the New Disability Claims Requirements – If an employer has already amended its ERISA Disability Benefit Plans to include the New Disability Claims Requirements, it is recommended that such amendments be retained for now. Each such employer should monitor any additional action that might be taken by the DOL to change and/or rescind the New Disability Claims Requirements.
- Employers That Have Not Yet Started To Make Changes To Comply With the New Disability Claims Requirements – If an employer with ERISA Disability Benefit Plans has not yet made changes to comply with the New Disability Claims Requirements, that employer will need to decide whether to delay making those changes until the DOL provides additional guidance on what it intends to do with the New Disability Claims Requirements. The DOL has asked for comments by December 11, 2017 on whether the April 1, 2018 effective date should be delayed further, and whether the New Disability Claims Requirements should be changed or rescinded. Although it is possible the DOL could delay the April 1, 2018 effective date further and/or change the New Disability Claims Requirements, it is not yet clear whether that will occur. If an employer decides to delay making changes to comply with the New Disability Claims Requirements, it will avoid any additional time and expense that might arise if the DOL changes and/or rescinds the New Disability Claims Requirements. However, such an employer should also be aware that even if it does not make changes to comply with the New Disability Claims Requirements, it: (1) could still be obligated to comply with several federal court decisions that require a full and fair review when reviewing claims for disability benefits in an ERISA Disability Benefit Plan; and (2) should make sure that it satisfies any applicable full and fair review requirements when handling such disability claims.

Why Did the DOL Delay the New Disability Claims Requirements?

On October 12, 2017, the DOL published a document in the Federal Register asking for comments on a proposed 90 day delay in the effective date of the New Disability Claims Requirements, and for comments and data on the merits of rescinding, modifying, or retaining the New Disability Claims Requirements. The DOL said it received approximately 110 comment letters, with many commentators strongly supporting a delay of more than 90 days (most requested a delay of six months to a year) and at least as many commentators equally strongly opposing any delay of any length.

The DOL said that the decision to delay the effective date for the New Disability Claims Requirements arose as a result of an

executive order issued by President Trump on February 24, 2017 that directed federal agencies to do a regulatory review, and make recommendations, regarding regulations that could be repealed, replaced, or modified in a way that would make them less burdensome. After the New Disability Claims Requirements were issued in final form by the DOL on December 19, 2016, the DOL said that it started receiving complaints from various stakeholders and members of Congress that implementation of the New Disability Claims Requirements would:

- increase the costs of administering disability benefit plans by, among other things, imposing new requirements and evidentiary standards when adjudicating claims;
- result in more litigation of claims for disability benefits, and in certain circumstances make it more difficult for employers to prevail in such litigation; and
- increase the costs of premiums for disability insurance plans, which could make it harder for employees to obtain disability insurance benefits (a survey of long-term disability carriers estimated that the New Disability Claims Requirements could result in premium increases of five to eight percent in 2018, and the carriers said that such increases could result in employees dropping or forgoing long-term disability coverage).

Commentators who opposed a delay of the January 1, 2018 effective date of the New Disability Claims Requirements said that:

- employees with disability claims need to have the increased procedural protections provided by the New Disability Claims Requirements;
- industry assertions that the New Disability Claims Requirements would result in increased costs and reduced coverage were unsubstantiated and undocumented; and
- serious issues exist as to whether a delay of the New Disability Claims Requirements would comply with the applicable requirements of the Administrative Procedures Act, and that litigation could occur regarding such issues.

After reviewing the comments received, the DOL decided to adopt the proposed 90 day delay to April 1, 2018 without change. The DOL said that it expects to receive data and information by December 11, 2017 regarding whether the New Disability Claims Requirements would result in increased costs and reduced coverage. After such data and information are received, the DOL said that it would give the public a reasonable opportunity to review and respond to such data and information. After that process is completed, the DOL will then consider whether any additional delay of some or all of the New Disability Claims Requirements beyond April 1, 2018 should occur. The DOL said its objectives with respect to its review of the New Disability Claims Requirements are to ensure full and fair reviews of disability claims, while not imposing unnecessary costs and adverse consequences.

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 insurance plans that provide benefits in excess of those required by applicable laws;
- long-term disability insurance 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 vocation 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 be treated as 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 If They Become Effective?

If the New Disability Claims Requirements become effective, employers with ERISA Disability Benefit Plans will want to timely amend each such plan to incorporate the New Disability Claims Requirements in order to try to obtain 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 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 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 If the New Disability Claims Requirements Become Effective?

If the New Disability Claims Requirements become effective, employers with ERISA Disability Benefit Plans should make any needed changes in the benefit claims procedures for those plans. 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).

What Is Likely To Happen To the New Disability Claims Requirements?

The DOL has asked for a substantial amount of data that will help it assess whether the New Disability Claims Requirements will be burdensome for employers to comply with, and it would not be surprising if the 90 day extension is extended further to allow all that data to be analyzed. If an analysis of that data indicates that the New Disability Claims Requirements will be burdensome for employers, it also would not be surprising if the DOL eventually decides to modify the New Disability Claims Requirements.

In light of the uncertain status of the New Disability Claim Requirements, employers with ERISA Disability Benefit Plans should monitor future DOL guidance on the New Disability Claims Requirements to see what changes, if any, may need to be made to those plans.

If you have any questions about this memorandum, please contact 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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