From: Cassie Ayeni [mailto:Cassie@benefitslaw.com]
Sent: Friday, October 20, 2017 3:33 PM
To: EBSA, E-ORI - EBSA
Subject: RIN 1210-AB39

Dear Mr. Hauser:

Thank you for allowing the opportunity to comment on the proposed 90-day delay of implementation of the disability regulations. I oppose any delay, as there is no legitimate cost concern that could possibly be raised to comply with the regulations' requirements. I will address each point of the regulations in turn:

1. ***Regulation:*** Decisions to hire, pay, terminate or promote any individual (including medical examiners and vocational experts) cannot be based on the likelihood they will support denying benefits. This rule "extends to individuals hired or compensated by third parties engaged by the plan with respect to claims."
***Rationale for avoiding delay*:** The Supreme Court has made clear in *MetLife v. Glenn* that conflicts of interest are important in ERISA disability claims management, and should be avoided at all cost. There is great risk to claimants for mismanagement of their claims if decisions to hire, pay, terminate, or promote are based on likelihood of benefit denials. Yet for years, the same few companies have received millions of dollars from insurance as fees for "medical records reviews" and IMEs by the physicians they employ. The time has come for this biased practice to stop. This regulation more than any other is time-sensitive and should not be avoided. Further, there is no cost for compliance: it is merely a matter of what *not* to do in the future.

2. ***Regulation:*** Provide claimant (even when not requested) with a free copy of any "new or additional evidence considered, relied upon, or generated by the plan, insurer, or other person making the benefit determination (or at the direction of the plan, insurer or such other person)" in connection with a claim before a decision is made. Claimant must be given a chance to respond to the new or additional evidence
***Rationale for avoiding delay*:** The claim file is maintained and regularly updated. Insurers frequently send the entire claim file via CD or other electronic means. There is minimal cost associated with providing updated information once it is clear that a decision will be made to terminate or deny benefits so that the claimant can avoid costly delay in payment by providing the information required to continue benefits. In an ongoing, open communication, this is the sort of important information that should be exchanged freely, not kept hidden until benefits have terminated.

3. ***Regulation***: Claim denial letters must discuss, in detail, why the Plan disagrees with: a) The view of any healthcare professional or vocation professional consulted during the claim determination (even if not relied upon in making the determination); b) A contrary disability determination made by the Social Security Administration
***Rationale for avoiding delay*:** This regulation adheres to the judicial requirement that to avoid a decision that a decision to deny benefits is arbitrary and capricious, the insurer must explain "why" evidence supporting disability is invalid. There is very little cost associated with this decision, besides intellectual effort to explain the rationale for a decision. There is no good reason to delay a requirement that insurers explain their rationale for discontinuing someone's income.

4. ***Regulation:*** Initial adverse determination must include a copy of any internal rules, guidelines, protocols, standards or other similar criteria of the plan, or a statement that they do not exist.
***Rationale for avoiding delay*:** More often than not, insurance companies say that these do not exist. Therefore, there is no cost for compliance.

5. ***Regulation:*** All adverse benefit determinations must be provided in a "culturally and linguistically" appropriate manner (i.e. translated into a non-English language spoken by the ten percent or more of the population in the county to which a notice is sent).
***Rationale for avoiding delay*:** Insurers already comply with this in the health context. The same translation software can be utilized here.

6. ***Regulation:*** An adverse benefit determination must now describe any applicable contractual limitations period that applies to the claimant's right to bring a civil action under ERISA.
***Rationale for avoiding delay*:** The contractual limitations period is clearly spelled out in the disability policy. However, most claimants never receive a copy of that policy and would have no idea what to look for if they did. The insurer, however, can easily locate the term and flag it just as it flags potential offsets at the onset of the claim. This is not a great burden and helps alert claimants of the need for timely communication.

7. ***Regulation***: Must disclose any medical or vocational experts consulted in the course of determining an appeal, even if they were not relied upon making the determination.
***Rationale for avoiding delay*:** This information is at the fingertips of all claims handlers, and there is no rationale for avoiding disclosure.

8. ***Regulation:*** If the Plan does not provide a timely response, the claim is "deemed denied", and the judicial review could be de novo, unless the plan can show the violation was all of the following:

- De minimis
- Non-prejudicial
- Attributable to good cause or matters beyond the plan's control
- In the context of an ongoing good-faith exchange of information
- Not reflective of a pattern or practice of non-compliance

Rationale for avoiding delay: ERISA is intended to provide "ready access" to federal courts. A delay on implementation of this regulation would reward insurers that delayed payment of a claimant's claim in violation of the already-existing regulations. When a plaintiff's benefit is denied, there is a ticking time bomb for when she will suffer irreparable harm from the adverse benefit decision: she may lose her house, she may not have enough money to rent, she may lose her car, she may go bankrupt. There is no greater challenge to a person with a disability than a loss of income on top of that disability. Allowing a deemed denial where there is a lack of timely response enables a claimant to start the process of reinstatement by availing herself of the court's power to reverse that decision. It is crucial that this regulation be implemented without delay.

I encourage you to implement the Regulations as intended without delay. I am happy to provide further comment or testimony if needed.

Sincerely,

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