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AFL-CIO
AMERICA'S UNIONS

Submitted by email to e-ORI@dol.gov

October 27, 2017

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Attn: Claims Procedures for Plans Providing Disability Benefits Examination

Re: RIN 1210-AB39
Docket ID: EBSA-2015-0017-0291

Ladies and Gentlemen:

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is pleased to submit these comments to the Department of Labor ("DoL" or "Department") on its Notice of Proposed Rulemaking ("NPRM")[1] to extend for 90 days the applicability date of the Final Rule[2] amending the disability claims procedure requirements under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") for employee benefit plans that provide disability benefits.

Currently, the Rule is scheduled to apply to disability benefit claims under ERISA-covered employee benefit plans filed on or after January 1, 2018. DoL states that the purpose of the proposed delay is to enable the Department to obtain additional public input on the Final Rule's impact on affected entities and then

[1] The Notice, published in the Federal Register on October 12, 2017 (82 Fed. Reg. 47409), is available at https://www.gpo.gov/fdsys/pkg/FR-2017-10-12/pdf/2017-22082.pdf.

[2] The Final Rule, published in the Federal Register on December 19, 2016 (81 Fed. Reg. 92316), is available at https://www.gpo.gov/fdsys/pkg/FR-2016-12-19/pdf/2016-30070.pdf.

consider regulatory alternatives that ensure the full and fair review of disability benefit claims "while not imposing unnecessary costs and adverse consequences." [3]

The AFL-CIO supports the Final Rule at issue moving forward on schedule in its current form; for the reasons discussed below, we see no justifiable reason for delaying its implementation.

The AFL-CIO is a voluntary, democratic federation of 56 national and international labor unions that collectively represent 12.5 million working people. We work every day to improve the lives of people who work for a living. We help people who want to join together in unions so they can bargain collectively with their employers for fair pay and working conditions and the best way to get a good job done. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded, and that their workplaces are safe. Further, to help our nation build a workforce with the skills and job readiness for 21st century work, we operate the largest training network outside the U.S. military. We also provide an independent voice in politics and legislation for working women and men and make their voices heard in corporate boardrooms and the financial system.

All working people have a stake in public policy that affects their income security and that includes the rules that determine whether the systems of earned public and private benefit plans work for them. Private disability benefits earned on the job are uniquely important because of the protections they provide when a working family endures the inherently simultaneous health and financial crises associated with the onset of a disability, regardless of whether it is a short- or long-term episode. Workers face a significant risk of becoming disabled: Before reaching retirement age, 1-in-4 20-year-old workers insured by Social Security, for example, will become unable to work for a year or longer at some point.[4] Among some particular occupations, and when periods less than a year are considered, the incidence of disability that interferes with the ability to work is even more common. Nevertheless, critical social insurance systems for workers who suffer from disabilities are far from adequate, meaning private coverage has an important role to play.[5]

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[3] 82 Fed. Reg. 47409

[4] Johanna Maleh and Tiffany Bosley, Social Security Administration, Office of the Chief Actuary, "Disability and Death Probability Tables for Insured Workers Born in 1997," Actuarial Note No. 2017.6 (Oct. 2017) t. E *available at* https://www.ssa.gov/OACT/.

[5] Social Security Disability Insurance covers long-term disabilities only and provides very modest benefit amounts. States increasingly have cut workers' compensation benefits by restricting eligibility and reducing benefit amounts. Nick Buffie and Dean Baker, *Rising Disability Payments: Are Cuts to Workers' Compensation Part of the Story?* (Center for Economic and Policy Research Oct. 2015) p. 4 *available at* http://cepr.net/documents/rising-disability-payments-2015-10.pdf.

Union members have a significant stake in ERISA-covered employee benefit plans having fair disability claims procedures so that plan participants receive the benefits to which they are entitled in the event a disability renders them unable to work. Private-sector union members are more likely to participate in disability plans through work, often through their collectively bargained defined benefit pension plans.[6]

The Final Rule

Last year, with the aim of ensuring a full and fair disability claims review process, and in support of recommendations made by the ERISA Advisory Council,[7] the Department, under its regulatory authority,[8] updated its regulations as to the minimum procedural protections and

[6] A significantly greater number of union-represented, than non-represented, workers in the private sector participate in short-term disability plans— i.e. 65% of union workers vs. 37% of non- represented workers. U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2017*, Bulletin 2787 (Sept. 2017), t.16, "Insurance Benefits: Access, participation and take-up rates, private industry workers," *available at* https://www.bls.gov/ncs/ebs/benefits/2017/ownership/private/table16a.pdf. Worker participation in both short-term and long-term disability benefit coverage is lower than other workplace benefits. In the private sector, only 40 percent of workers participate in short-term disability benefits and 32 percent do so with respect to long-term disability benefits. The participation rate differential for long-term disability benefits between represented and non-represented workers is only 6 percentage points, significantly smaller than the 28 percentage point differential for short-term disability benefits. National Compensation Survey: Employee Benefits in the United States, March 2017, t.2, "Retirement benefits: Access, participation, and take-up rates, private industry workers, March 2017." Further, collectively bargained defined benefits plans, in which two-thirds of private-sector union members participate, typically include this coverage. U.S. Bureau of Labor Statistics, *National Compensation Survey: Health and Retirement Plan Provisions in Private Industry in the United States, 2014*, Bulletin 2781 (April 2015), t.26, "Defined benefit plans: Availability of selected benefit features, private industry workers," *available at* https://www.bls.gov/ncs/ebs/detailedprovisions/2014/ownership/private/ebbl0056.pdf.

[7] In 2012, the independent ERISA Advisory Council urged the Department to reexamine the disability claims procedure because of evidence that the existing claim procedure regulations were not protecting plan participants as intended. "The Council was made aware of reoccurring issues and administrative practices that participants and beneficiaries face when appealing a claim that may be inconsistent with the existing regulations." 2012 ERISA Advisory Council Report, Managing Disability Risks In An Environment of Individual Responsibility," p. 6, *available at* https://www.dol.gov/sites/default/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2012ACreport2.pdf

[8] Section 503 requires employee benefit plans to establish and maintain reasonable procedures regarding the filing of benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations. *See* 29 USC §§1133 and 1135.

safeguards required of plans offering disability benefits.[9] The AFL-CIO filed comments in support of this action.[10]

The Department tailored the Final Rule, published on December 19, 2016, with an effective date of January 18, 2017[11] to achieve the following important objectives that build on the claims procedure regulations the Department adopted in 2000 providing enhanced protection for disability benefits:[12]

- Ensure that disability claims and appeals are adjudicated independently and impartially;
- Provide a full discussion of all reasons for a claim denial;
- Ensure that claimants have access to their entire claim file and other relevant documents and be guaranteed the right to present evidence supporting their claim during the review process;
- Provide claimants with an opportunity to respond to new evidence and rationale at the appeal level;
- Ensure that claimants have the opportunity to seek court review if the plan fails in a major way to comply with claims procedure requirements;
- Provide that certain coverage rescissions be treated as adverse benefit determinations, triggering a plan's appeals procedures; and
- Require that claims and appeals notices and disclosures are written in a culturally and linguistically appropriate manner.

The Regulatory Impact Analysis ("RIA") accompanying the Final Rule[13] reflects the Department's thorough consideration of all comments filed during the rulemaking. The RIA

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[9] *See* 29 CFR §2560.503-1.

[10] Our comments in support of the proposed Rule, published on November 18, 2015, are available at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AB39/00100.pdf. With a few clarifications, the Final Rule largely tracked the proposed Rule.

[11] As the Department made clear in its Regulatory Impact Analysis, the Department carefully incorporated into the Final Rule only certain of the procedural protections and safeguards added by the ACA to the claims procedures for group health plans, and made several adjustments to the ACA requirements to account for the different features and characteristics of disability benefit claims.

[12] Employee Retirement Income Security Act of 1974; Rules and Regulations for Administration and Enforcement; Claims Procedure; Final Rule, 65 Fed.Reg. 70246 (Nov. 21, 2000), *available at* https://www.gpo.gov/fdsys/pkg/FR-2000-11-21/pdf/00-29766.pdf amended at 66 Fed. Reg. 35887 (July 9, 2001*) available at* https://www.gpo.gov/fdsys/pkg/FR-2001-07-09/pdf/01-17145.pdf.

[13] The RIA is Part III of the preamble to the Final Rule at pages 92331 through 92340.

concludes that the Rule will entail minimal cost,[14] and that its expansion of claimants' due process rights is necessary if they are to receive a full and fair review. Specifically, the RIA shows how the Final Rule will: alleviate the hardship of those who have become so disabled that they are unable to work, but whose claims are denied; result in greater consistency in the handling of disability claims and appeals; improve access to information about how claims and appeals are adjudicated; and lead to efficiency gains at both the macro-economic and individual plan levels.

As to the Rule's potential costs, the RIA is clear that opponents failed to offer evidence to support their allegations of cost burden.[15] Even so, in response to assertions that it underestimated costs, the Department adjusted the Final Rule to reflect those concerns.[16] Furthermore, there were several requirements opponents expressly supported. [17]

As the RIA notes, the comments received from some industry groups support the conclusion that the allegedly "burdensome" protections adopted in the Final Rule reflect best practices that many insurers and benefit provides already follow voluntarily.

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[14] The RIA addresses each cost objection one-by-one.

[15] *See, e.g.*, RIA at 92335 ("The commentator provided no alternative estimates or data supporting their assertions that the Department could use to revise its cost estimates [for staff to identify, and respond to, the additional new information or rationale required in the event of an adverse benefit determination or that this new information would trigger a response by the claimant which would entail a costly response]." RIA at 92338 ("One commentator questioned whether the $500 per document translation cost accurately reflects the costs to comply with this provision. The commentator, however, failed to explain its rationale or provide any alternative information the Department could use to refine its estimate."); and RIA at 92339 ("While all these scenarios [of increased litigation and the accompanying costs] are possible, the Department does not know of, nor did commentators provide, any data or information that would even be suggestive of, the frequency of these events, or the added expense resulting from their occurrence.")

[16] RIA at 92332.

[17] For example, "The Department received numerous comments either generally supporting or not objecting to the idea that the independence and impartiality requirements for disability claims procedures should be consistent with the ACA's claims procedures requirements for group health plans." RIA at 92319. Further, no objections were made to the requirement that an adverse benefit determination at the initial claims stage include a statement that the claimant must receive, upon request, documents relevant to the benefits claim [RIA at 92324]; or to the requirement in an adverse benefit determination to explain a disagreement with a treating health care professional [RIA at 92320]; or to the amending of "adverse benefit determination" to include a rescission of disability benefit coverage that has a retroactive effect. RIA at 92328.

No Legitimate Justification for a Delay

The Final Rule and supporting RIA were published less than a year ago. In the short time since then, we have seen no evidence that would minimize the Rule's projected benefits. The Department, however, has decided to propose a delay in the applicability date based on unsupported assertions by insurance industry and employer lobbying groups and their representatives that the Rule "will drive up costs, cause an increase in litigation and thus impair workers' access to disability insurance protections."[18]

For example, in the preamble to the proposed rule, the Department describes a private email communication to DoL officials that references a "confidential survey" of group long-term disability insurance carriers conducted by unnamed "stakeholders."[19] The preamble describes this "confidential survey" as including statements from "several survey participants" that the Final Rule would "cause average premium increases of 5-8% in 2018." We find it deeply troubling that the Department is re-opening this already thoroughly considered and deliberated Rule based on these kinds of unsubstantiated assertions by unnamed "stakeholders."

Our concern is heightened by the Department's lack of transparency concerning this information. We note the Department has not made it possible for the AFL-CIO, or any other stakeholder, to access this new "evidence"[20] online or evaluate what is clearly part of the administrative record. This unprecedented and outrageous action by the Department should be immediately reversed by making all of the "evidence" publicly available.

A Delay Rewards Those Who Have Not Made a Good Faith Effort Towards Implementation.

There is no indication that the plan sponsors who are taking seriously their obligation to comply with the Rule by January 1, 2018 have not begun to alter their disability claims procedures in order to meet the current deadline. Accordingly, if the Department imposes an implementation delay, it will penalize those who have already expended time and energy to come into compliance—while rewarding those plans who have been less conscientious about their legal obligations.

[18] 82 Fed. Reg. at 47411.

[19] 82 Fed. Reg. at 47411 (citing email from Michael Kreps, Principal, Groom Law Group, to John J. Canary and Jeffrey J. Turner, Office of Regulations and Interpretations, Emp. Benefits Sec. Admin. (July 13, 2017) (on file with the Emp. Benefits Sec. Admin., U.S. Dept. of Labor).

[20] The "evidence" includes the communications referenced in NPRM footnotes 2, 3, 6, 7, and 9 (82 Fed. Reg. 47411).

We appreciate the opportunity to submit these comments. If you have any questions or need additional information, please do not hesitate to contact us.

Very truly yours,

/s/ Shaun C. O'Brien

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