BOLT KEENLEY KIM LLP

1010 Grayson Street, Suite Three
Berkeley CA 94710

T: 510 225 0696
F: 510 225 1095

bkim@bkkllp.com
www.bkkllp.com

December 7, 2017

Via E-Mail (e-ORI@DOL.gov)

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room M-5655
U.S. Dept. of Labor
200 Constitution Avenue NW
Washington D.C. 20210

Re: Re-Examination of Claims Procedure Regulations for Plans Providing Disability Benefits
RIN No.: 1210-AB39
Regulation: 29 C.F.R. §2560.503

Dear Deputy Assistant Secretary Hauser:

I write to urge the Department not to modify or further delay the final disability claims regulations (Final Regulation on Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (Dec. 19, 2016)), currently scheduled to go into effect on April 1, 2018.

I represent long-term disability claimants in pre-litigation appeals and litigation under the Employment Retirement Income and Security Act ("ERISA"). My clients are hard-working employees who are granted group long-term disability insurance or protection by their employers in the event they become disabled, as part of their employee benefits package. However, when these clients become disabled, all too often the insurance industry and plan administrators do not live up to their promise to provide coverage and improperly deny or terminate valid claims. With no work income due to disability and no long-term disability benefits due to a claim denial, my clients are in an extremely vulnerable position medically, financially and emotionally when attempting to appeal a claim denial or termination, and are targets for adversarial claims handling by the industry during the appeal process. The final rules aim to curb some of the worst abuses committed by the industry in this regard and level the playing field for employees and claimants.

The objections now raised by the insurance industry regarding the costs of the final rules are merely recycled from their previous objections to the merits of the final rules. While another

argument about the merits of the final rules is unnecessary, I will address the objections regarding the purported costs of the final rules, as these objections lack merit and are not based on any credible data.

The BLS Data Demonstrates that the Types of Reforms to the ERISA Claims Review Process Sought by the Final Rules Will Not Increase Costs

The industry asserts that implementing of the final rules will result in an increase in costs, followed by an increase in premiums and less access to disability benefits. The industry already made this argument in various industry comments to the proposed rules before final adoption, and the Department has already concluded that costs would not outweigh the benefits. Neither the Department nor any other administrative agency is required to "conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Michigan v. Environmental Protection Agency*, 135 S. Ct. 1699, 2711 (2015).

The Department has requested for data addressing whether costs increased in response to the last set of rules applying to ERISA disability plans that became effective in 2002. However, this data is already available through information supplied by its own Bureau of Labor Statistics ("BLS"). *See* https://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm.

The BLS data shows that between 1999 and 2014, access to and participation in employer-based disability insurance actually increased. This increase occurred despite the passage and implementation of the 2000 disability claims regulations—regulations that the industry previously objected to and attempted to block—as well a series of court decisions addressing the issues of conflicted decision-making, deemed exhaustion, the need to discuss and explain adverse benefits decisions, and the participants' right to respond to new evidence.

Thus, any data being supplied by the industry that suggests employers would abandon disability coverage due to the costs of codifying these principles is suspect, as the BLS data also shows that the cost of disability insurance is extremely modest. In reality, even if costs did increase, the increase would be so small that it would make little to no difference in premiums and certainly no difference in an employee's access to disability benefits.

The Department has asked for data about whether disability premiums increased in response to the adoption of statutory bans on discretionary language clauses in disability policies by some states. We note that numerous states enacted discretionary clause bans during the time frame of the BLS study, including but is not limited to Arkansas Admin. Code 054.00.101-4 (2013); Cal. Ins. Code §10110.6 (2012); Colo. Rev. Stat. §16-3-1116 (2008); 50 Ill. Admin. Codes 2001.3 (2005); Md. Code ann. Ins. §12-211; Mich. Admin. Codes. R. 500.2201-2202 (2007); R.I. Gen. Law §§ 27-18-79; Tex. Admin. Code §3.1202-1203; Tex. Ins. Code §1701.062, §1701.002 (2011); WAC §284-96-012 (2009). Yet as the BLS data shows, access and participation in disability plans increased during and after these statutory bans were passed.

Moreover, two major insurers with significant market share in the disability insurance market, UNUM and CIGNA, were examined by the states for poor claims handling and became subject to fines and Regulatory Settlement Agreements that raised the bar for their claims administration, during the period covered by the BLS document: http://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2004/unum_multistate/unu

m_multistate.html;
http://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2009/pdf/cigna_mcreport_2009.pdf.
https://www.insurance.ca.gov/0400-news/0100-press releases/2013/release044-13.cfm.

Despite these regulatory actions against the insurance industry to curb its claims administration abuses, access and participation actually increased during this period, as demonstrated by the BLS data.

Given the BLS data for the period in question, the industry's claim that costs will increase in response to the modest changes in the final rules does not ring true. Therefore, the Department should not change the final rules in response to the industry's flawed argument that the purported costs of the final rules will impact access to disability benefits in the workplace.

Any Purported Costs Resulting from the Final Rules Are Significantly Outweighed by the Benefits to ERISA Participants

Even if one assumes that implementing the final rules will impose some costs—a faulty assumption as explained above—such purported costs do not outweigh the benefits of the final rules. The Department has already articulated its purposes – to make sure claims are fairly adjudicated and to prevent unnecessary financial and emotional hardship. The final rules attempt to actualize these purposes, and the Department should reject the industry's invitation to abandon these purposes. The benefits resulting from implementing the final rules cannot be outweighed by costs, when the ERISA pre-litigation process is already so slanted in favor of the plan administrators and insurance companies.

When ERISA disability claimants are denied their disability benefits, they face a process where the level of procedural due process is far below the standard for regular civil disputes. The procedural hurdles in ERISA cases include: (1) no jury trials; (2) a closed record from the claims process that can rarely be supplemented in litigation; (3) an unfavorable and deferential standard of review from the courts; and (4) no remedies such as emotional distress and punitive damages to discourage unfair and self-serving behavior on the part of plans. It is no surprise that this procedural framework invites adversarial claims handling by plan administrators and insurance companies, as courts have noted. *See, e.g., United States v. Aegerion Pharmaceuticals, Inc.*, 2017 WL 5586728, at *7 (D.Mass. Nov. 20, 2017)(Noting "[t]he insurance industry found it could largely immunize itself from suit due to the Employee Retirement Income Security Act ("ERISA").).

Even with the final rules in place, plan participants will not have achieved the "higher-than-marketplace standards" that the Supreme Court insists are required from plan administrators and insurers in processing ERISA claims. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008). The Department should take these "higher-than-marketplace standards" into account and acknowledge that ERISA exists to protect plan participants—not the profits of the insurance industry—when comparing the benefits of the final rules relative to costs.

It is telling that the industry consistently refuses to acknowledge the immense financial and emotional costs to claimants when plan administrators and insurers improperly deny or terminate valid claims. I have had clients who have lost their homes and had their families broken apart

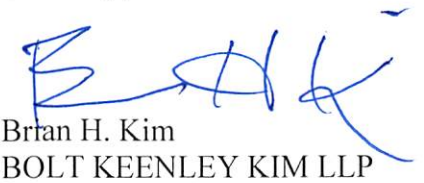
after suffering a wrongful claim denial or termination obtained through abusive claims administration practices by the industry. Disabled claimants are often shocked when they are told about ERISA's procedural hurdles and how instead of providing a "full and fair review" of a claim denial as required by the ERISA regulations, plan administrators and the insurance industry use the appeal process to confound and thwart disabled claimants with permanently disabling conditions.

The increased protections contained in the final rules would take minimal time for the industry to implement and result in minimal costs, but the benefits to claimants would be significant, as meritorious claims would not be lost due to procedural tactics by the industry.

In sum, the purported costs associated with the increased protections contained in the final rules are greatly outweighed by the benefits, especially since these protections bring disability claims administration in line with the reasonable expectations of plan participants for whom the ERISA statute and regulations are intended to protect.

Thank you for your consideration in reviewing my concerns regarding the industry's attempts to roll back the final rules. I urge the Department to immediately implement the final rules without further delay, as the industry's reasons for doing so are unsupported by the data and are outweighed by the obvious benefits to claimants and plan participants.

Sincerely,



Brian H. Kim
BOLT KEENLEY KIM LLP