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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

***VIA EMAIL*:** e-ORI@dol.gov

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 am writing to discourage the Department from modifying or further delaying the final disability claims regulations (Final Regulation on Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (Dec. 19, 2016)) that are now scheduled to go into effect on April 1, 2018.

I have been in private practice for more than 30 years. For a brief time prior to starting my own practice, I was in-house counsel for an ERISA plan administrator. I have drafted ERISA plan documents, including: comprehensive plan descriptions; summary plan descriptions; administrative services agreements; and claims manuals. For more than 20 years, my practice has been almost exclusively limited to handling long term disability and health claim disputes, litigation and appeals governed by ERISA, as well as ERISA benefit collections for healthcare providers and "in-network" provider disputes (e.g. HMO, PPO contract reimbursement). I have handled literally hundreds of benefit claims through all levels of administrative review, arbitration, litigation in federal court and before the Ninth Circuit Court of Appeals. My Peer Review Rating from Martindale-Hubbell is AV® Preeminent™, the highest rating achievable and I have held that rating for more than 15 years.

While I am grateful for the opportunity to comment on the Department's re-examination of the costs of the final rules governing disability claims, the concerns raised by the industry are not new. Rather, these objections appear to be simply re-argument of the merits of the final rules. Where those rules are based on policy choices that have been made by Congress, by this Department, and by the federal courts interpreting ERISA, another argument about the merits is unnecessary.

Nevertheless, I will address the objections that have been raised that I feel are most in need of a response:

Costs Will Not Increase

The industry claims if the final rules go into effect there will be an increase in costs that will increase premiums resulting in less access to disability benefits.

This costs argument was made in various industry comments to the proposed rules before final adoption. The Department concluded that costs would not outweigh the benefits. The current cry of increasing costs is an argument that has already been considered and rejected. An agency is not 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).

Nonetheless, the Department has asked for data addressing whether costs increased in response to the last set of rules applying to ERISA disability plans that became effective in 2002. In fact, the Department can rely upon information supplied by its own Bureau of Labor Statistics.
https://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm.
The data shows that access and participation in employer-based disability insurance has *increased*, not decreased, between 1999 and 2014. This increase occurred despite that employment in the service industry has increased, an industry in which employees are the least likely to have access to employer-based disability coverage. This increase also occurred despite the 2000 disability claims regulations and a series of court decisions addressing conflicted decision-making, deemed exhaustion, the need to discuss and explain adverse benefits decisions, and the participants right to respond to new evidence. I would therefore be suspicious of any data supplied by the industry now that suggests employers would abandon disability coverage due to the costs of codifying these principles. This BLS document also demonstrates that the cost of disability insurance is extremely modest. Thus, even if costs did increase, the increase would be so small that it is unlikely to make any difference.

The Department has also 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. Notably, during the time period of the BLS study, many states enacted discretionary clause bans. This includes 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). Notwithstanding these statutory developments, access and participation in disability plans increased according to the BLS data.

Also, during the period covered by the BLS document, two major insurers with significant market share, 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. http://www.maine.gov/pfr/insurance/publications_reports/exam_rpts/2004/unum_multistate/unum_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. Nonetheless, during this period access and participation increased.

Given this history, I dispute any claim that costs will increase in response to the modest changes in the final rules. Accordingly, I urge the Department not to change the final rules.

Sincerely,

Michael A. McKuin
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