From: David Lilienstein
Sent: Monday, December 11, 2017 1:36 AM
To: EBSA, E-ORI - EBSA
Subject: 1210-AB39 Please, NO MORE UNNECESSARY DELAYS

Via EMAIL

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room M-5655
U.S. Dept of LAbor
200 Constitution Avenue NW
Washington, DC 20210

re: Examination of Claims Procedures Regulations for Plans Providing Disability Benefits

RIN No: 1210-AB39
Regulation: 29 C.F.R. Section 2560.503

Dear Deputy Assistant Secretary Hauser, and any other interested individuals:

With this letter I strongly encourage you to ensure there are no further delays with the disability claims regulations that are scheduled to go into effect on April 1, 2018. Specifically, I refer to the Final Regulations of Claims Procedure for Plans Providing Disability Benefits, 81 Fed. Reg. 92316 (Dec. 9, 2016).

I am an attorney with almost two decades of experience with ERISA disability claims procedures. I have assisted disabled ERISA insureds with the initial claims process, I have helped draft appeals, I have litigated ERISA actions in both state and federal courts, and I have participated in appellate appeals of ERISA actions. Most of these actions are individual disability actions; some have been ERISA class actions. At almost every level of participation, the claims procedures come into play, and I can say with absolute certainty, based on years and years of experience and hundreds and hundreds of cases, that these procedures directly impact individual americans' access to their disability benefits, and as such directly impact Congress' intent with in originally passed the Employment Income Security Act.

It is regrettable that this email is necessary, as these newest final rules governing disability claims took a long time to write, and were the result of a long, deliberative process, during which all parties had plenty of opportunity to be heard. I have reviewed the newest, latest industry objections to the final rules, and there is nothing new about them. They simply attempt to re-litigate the merits of the final rules. In short, there is no there there. Further delay is not necessary, and will accomplish very litte other than consuming precious time and resources of you and your staff.

Specifically, the industry contends that the final rules will increase costs that will increase premiums that will result in fewer individuals receiving disability benefits. This is a chimera. It

is the industry's go-to argument to justify delay and maintain the status quo. It has been considered and rejected, and is baseless. It is also not a basis for further delay, as an agency is not required to "conduct a formal costs-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Michigan v. Environmental Prot. Agency.*, 135 S.Ct. 1699, 2711 (2015).

As to specific data addressing whether costs increased after the last set of rule updates, I note that I have not seen anything affrimatively demonstrating that this actually happened. To the contrary, the data I have seen shows that access to employer-spoonsored disability insurance increased since the turn of the century. Please refer to the department of Labor's own information, at https://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm.

On the issue of the impact of discretionary clauses on disability premiums, here again the industry cries wolf, and the real issue is the fines and regulatory settlement agreements that two of the largest insurers, UNUM and CIGNA, were subject to, due to their allegedly unfair and unlawful claims handling procedures. Go here:

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

Given this history, I urge you and your staff to consider industry complaints and assertions with a very skeptical eye, and not to change or delay any of the final rules because of unfounded industry complaints.

To be sure, the benefits of these new procedures far outweigh any purported costs of implementation. The Department has already stated that the purpose of these procedures is to ensure that claims are fairly adjudicated, and to prevent unnecessary financial and emotional hardship. Further delay would abandon these pruposes. To the exente that there might be some, existential, costs involved, the Department is not required to avoid all regulations that may impact the market in some way. Mkt. Synergy Group v. United States Dept. of Labor, 2016 U.S. Dist. Lexis 163663, 2016 Westlaw 6948061 (D.Jan. 11/28/2016).

Also to be sure, there are plenty of other changes to the claims procedure that would benefit insureds throughout the United States that were not passed. Let's start with access to jury trials--currently ERISA insureds are denied this Constitutional guarantee. Discretionary clauses, in those states where they still exist, slant the playing field dramatically against insures. Nothing in the new procedures will undo this unfairness.

This, of course, is only the tip of the iceberg. As one court has said, there will never be a level playing field in ERISA matters, much less one that favors plan participants. United States v. Aegerion Pharmaceuticals, Inc., 2017 Westlaw 5586728 at *7 (D. Mass. 2017).

Yours sincerely,

DAVID LILIENSTEIN
DL LAW GROUP

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DAVID LILIENSTEIN, ESQ.
DL LAW GROUP
CONSUMER REPRESENTATION
INSURANCE BAD FAITH EXPERTS
345 Franklin St
San Francisco, CA 94102
David@dllawgroup.com
Tel: 415-678-5050
Direct Cell: 415-392-2289
Fax: 415-358-8484