From: Lisa Serebin [mailto:lisa@creitzserebin.com]
Sent: Monday, December 11, 2017 9:25 PM
To: EBSA, E-ORI - EBSA
Subject: Claims Procedure Regulations for Plans Providing Disability Benefits; RIN No. 1210-AB39

Dear Deputy Secretary Hauser:

I am a former DOL attorney, now in private practice. I have practiced ERISA and employee benefits law for nearly 30 years. I represent many individual plan participants in benefit disputes, including a large number of disability benefit claimants. I previously wrote to you to oppose further delay in the implementation of the DOL's Final ERISA Claim Regulation at 81 Fed. Reg. 92316. I am writing to you now to oppose further modification or delay of the regulations.

The regulations were adopted after an extensive notice and comment period as required under the rulemaking provisions of the Administrative Procedure Act of 1946, 5 U.S.C. § 551 et seq. The insurance industry and plan sponsors who are now attempting to delay implementation of the final regulation had ample opportunity during the rulemaking process to provide their input. Not only has the DOL already carefully considered their input, the DOL has also already carefully considered the cost of implementing the regulations and determined that the cost would be minimal to the insurance industry.

There is simply no basis for the disability insurance industry's assertion that the DOL's regulation will increase the cost of plan administration, thereby driving up premiums and decreasing disability coverage for employees. The disability insurance industry trots out this tired argument every time the DOL attempts to level the playing field between disability claimants and the insurers. The DOL recognized that the ERISA claims process is skewed in favor of insurers when it issued the final regulation, noting that the regulation merely serves to strengthen protections for disabled workers by promoting fairness and accuracy in the claims review process. The explosion in federal court litigation over disability benefits has been driven by the lack of regulation, not the opposite, as claimants must avail themselves of the courts in order to obtain a full and fair hearing of their benefit claims – which is a plan participant's right under ERISA.

The fact that the regulation will not increase costs, thereby decreasing overall disability coverage, is borne out by the DOL's own data gathered by BLS. BLS's data (found here: https://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm) shows that between 1999 and 2014, there was an increase, not a decrease, in access and participation in disability benefit plans, despite the DOL's issuance and enforcement of the 2000 disability claims regulations. It is notable that during this period of time, two of the major players in the disability insurance field – UNUM and CIGNA – were both cited and fined by state insurance commissioners for their poor claims handling processes. As a result, both UNUM and CIGNA were subjected to remedial provisions of regulatory settlement agreements. Yet BLS's statistics still indicate an uptick in access and participation in disability benefit plans during this period of time.

There is no evidence to indicate that the regulations would increase the cost of disability plan administration. Yet even if there is an incremental cost increase, the DOL cannot lose sight of the fact that ERISA exists to *protect* benefit plan participants, and any incremental cost increase in plan administration is outweighed by the benefit the regulations provide to plan participants. The DOL's stated position that the purpose of the regulations is to ensure that claims are fairly adjudicated and to prevent unnecessary financial and emotional hardship cannot be abandoned, especially given the fact that the administrative process provided under ERISA already disadvantages plan participants whose benefits are denied: there is no right to a jury trial under ERISA, the evidentiary record in an ERISA case is limited almost entirely to the administrative record assembled by the insurer; courts frequently adopt a deferential standard of review to benefit denials; and there are no punitive remedies to deter unfair and self-serving conduct by insurance companies. When claimants come to my office for help in appealing their benefit denials, they are shocked to discover that there is virtually no incentive for the fair and just adjudication of their disability claims because of ERISA's lack of remedies. Even the courts recognize that because of ERISA's limitations on remedies, insurers can act with impunity in denying benefits because claimants have such limited recourse. ("The insurance industry found it could largely immunize itself from suit due to the Employee Retirement Income Security Act ("ERISA"). *United States v. Aegerion Pharmaceuticals, Inc.*, 2017 WL 5586728, at *7 (D. Mass. November 20, 2017)).

There is no reasonable justification for the further delay and implementation of the regulations. The changes to the claims procedure regulations were long overdue and are a necessary step in the right direction towards providing disabled participants and beneficiaries with adequate due process in claims administration.

Sincerely,

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