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Sent: Thursday, October 19, 2017 1:16 PM
To: EBSA, E-ORI - EBSA
Cc: patrick@pmauselaw.com
Subject: RIN 1210AB39 -- Opposition to Effective Date of ERISA Rules

I write to oppose the DOL's proposal to extend the effective date of the ERISA disability rules published December 19, 2016. Those rules are scheduled to go into effect as to claims filed on or after January 1, 2018 — one year after publication. The proposed rules were originally published in the Federal Register on November 18, 2015 after which the public (and industry) had the opportunity to submit public comments. It now appears that industry and others working on their behalf have been lobbying behind the scenes to delay or reverse the properly considered and adopted rules. This is inappropriate and is not a legitimate basis to delay the rules' effective date.

The October 12, 2017 Federal Register notice states:

The Final Rule currently is scheduled to apply to claims for disability benefits under ERISA-covered employee benefit plans that are filed on or after January 1, 2018. Following publication of the Final Rule, **various stakeholders** and members of Congress asserted that it will drive up disability benefit plan costs, cause an increase in litigation, and in so doing impair workers' access to disability insurance benefits.

(emphasis added). There is no explanation who those "various stakeholders" are or what information they submitted claiming the revised rules "will drive up disability benefit plan costs…" There is likewise no information showing how those anonymous stakeholders claim the rules will drive up costs or cause an increase in litigation. There is also no evidence or assertion that those stakeholders were precluded from advocating for their views during the open comment period during which multiple stakeholders (including me) submitted public comments, which the DOL subsequently considered. Consequently, there does not appear to be any legitimate or persuasive basis to delay the proposed rules.

Industry stakeholders had ample time to comment on the rules when they were originally proposed and, having reviewed some of the comments myself, I know they took that opportunity. The DOL considered their comments and the comments of other stakeholders and properly adopted the rules published December 19, 2016. There is no reason to delay the effective date of those rules when industry had a year to adopt procedures that comply with those rules.

Moreover, not only is the DOL's proposed delay procedurally improper under the Administrative Procedures Act, but it also appears to be substantively unsupported. I will briefly address each issue noted in the October 12, 2017 publication below because I do not believe one — or all — of the properly adopted rules would "drive up disability benefit plan costs."

1: Disclosure Requirements Relating to Rejections of Social Security Disability Income (SSDI) Awards — There is no basis to delay implementation of this rule. Not only are at least two disability insurers (Unum and Cigna (aka Life Insurance Company of North America)) already bound to comply with similar procedures due to their Regulatory Settlement Agreements, but it should not be difficult or expensive for a disability provider, acting in its ERISA fiduciary capacity and providing claimants with the full and fair review they are entitled to receive, to explain why it disagreed with or rejected a fully-favorable SSDI award. If the carrier fails to give that award sufficient and fair consideration, it is not complying with its ERISA obligations as a matter of law. And if it is giving the SSDI award sufficient and fair consideration, it should not be difficult or expensive to explain that to the claimant. In fact, having reviewed hundreds, if not thousands, of disability claim files, all that should require is a simple copy-and-paste from its internal analysis to the denial letter. There is no added cost to this regulation.

2: Providing Notice of the Internal Protocols Relied Upon in Denying a Claim — As with the rejection of an SSDI award, if a disability carrier is relying on internal claim procedures or protocols when denying a claim, it should not be difficult or expensive for them to provide that information to the claimant. That information should already be included in the company's internal analysis so all that should be required is a simple copy-and-paste or explanation of those internal rules or protocols.

3: Reviewing and Responding to New Information — As far as I am aware, the common law of ERISA holds that disability carriers may not issue a final claim denial based on a new rationale without providing the insured the opportunity to respond. In fact, I know from personal experience in litigation that, when such circumstances arise, disability carriers do not hesitate to argue to the court that the proper remedy is for the court to remand the claim back to the carrier so it may consider this issue and any additional information the claimant may seek to submit addressing the new rationale. There is no added difficulty or expense in codifying this rule and codifying it should *reduce*, not increase, litigation.

4: Avoiding Conflicts of Interest — Again, disability claim administrators are fiduciaries under ERISA and are obligated to provide claimants with a full and fair review of their claim. If disability carriers and other industry stakeholders are taking the position that this rule would increase costs, that should be seen as an admission that they have been putting their financial interests ahead of their insureds' interests in receiving a full and fair claim review; a clear violation of the carriers' ERISA obligations. Thus, to the extent this rule could arguably be seen to increase costs, it is absolutely essential. Alternatively, if disability carriers take the position that their conflicts of interest do not affect claim decisions (which is invariably their position in litigation), then there would be no added cost to implementing this rule. Simply put, if the carriers' litigation position is true, there is no added cost. And if the carriers' financial conflicts are infecting the claims process, the rule is not only essential, but should have the effect of reducing litigation by leading to more fair and impartial claims decisions.

5: Deemed Exhaustion if Timely Decision Not Made — This is another rule that is consistent with the common law of ERISA, such as *Spinedex* in the Ninth Circuit and *Halo* in the Second

Circuit, and previous ERSIA regulations. Consequently, there can be no added expense to this rule.

6: Rescinding Coverage Triggers Appeal Rights — If industry is complaining that claimants are too quick to run to court (*e.g.* No. 5, above; Federal Register summary quoted above), they should be embracing this rule as an effective way to reduce costs and litigation. Providing disability claimants with an appeal if an insurer rescinds coverage should reduce litigation and costs, not increase it.

7: Communications in Non-English Languages — Some insurers are already complying with this requirement by including a page explaining in multiple languages that non-English language services are available. And since this is already a requirement for health plans, this is not hard or expensive.

In short, industry stakeholders had a full opportunity to respond to the DOL's proposed rules when they were published on November 18, 2015. They did submit public comments, as did multiple other stakeholders. The DOL properly considered those public comments in adopting the final rules and provided that those rules would only apply to claims filed on or after January 1, 2018. Those procedures should not be expensive or difficult and, contrary to industry arguments, should actually reduce litigation rather than increasing it. Industry stakeholders' behind-the-scenes lobbying based on undisclosed cost claims is improper, contrary to the Administrative Procedures Act, and does not constitute a valid basis for delaying the rules' implementation. I therefore oppose the DOL's proposal to delay the rules' effective date and ask the DOL not to implement the proposed rule delaying the effective date of the final rules.

If you have any questions or would like to discuss this issue, please feel free to contact me. Additionally, if the DOL or anyone working on its behalf will be holding additional behind the scenes meetings or discussions with industry stakeholders about these issues, I ask the DOL to either publicly disclose the time and location of those meetings or discussions so stakeholders like me may attend, or that it personally notify me so I may personally attend.

Sincerely,

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