

By Mail: 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: Claims Procedure Regulations for Plans Providing Disability Benefits
Examination
RIN No.: 1210-AB39
Regulation: 29 C.F.R. §2560.503-1

Dear Secretary Acosta,

For eight years I represented claimants in ERISA benefit matters both in the internal appeals process and in litigation. The vast majority of my clients were seeking to reverse denials of disability claims. For the last 6 years I have worked as a consultant to other ERISA benefits attorneys. In that capacity I read hundreds of ERISA decisions and court filings each year and am keenly aware of the issues surrounding the adjudication of ERISA disability benefits and the requirements of full and fair review.

The Department's proposed delay of the final regulations raises serious issues regarding the transparency of the rule making process. The Department finalized rules after an extensive notice and comment period that provided 60 days and yielded numerous comments from various stakeholders. The Department considered the comments for nearly a year. Insurers and plans, and the organizations that represent them, took the opportunity to comment. Many of industry comments suggested that there were costs associated with implementing the rules but these comments were highly speculative. Those comments were not ignored. When the industry asked for more time to implement the changes, that request was honored and the effective date of the final regulations was delayed.

Now we are told that other input is being relied upon - information that could have been contributed during the proper notice and comment period but somehow was not. The ERISA participants and their representatives have no way to respond to this input, since it is not being made available. The public is not being told why this information is more valuable than what was collected during the notice and comment period. It is clear that there were meetings with industry representatives and that the industry and certain members of Congress sent letters, but the content of these meetings and letters are not entirely disclosed. The industry apparently referenced a "confidential" study that predicts an increase in premiums. It is also troubling that the very short 15-day notice and comment period to respond to the proposed delay does not even provide time for an individual to make a FOIA request to uncover what is influencing this process.

To make matters worse, the industry study that the Department is now proposing seems to allow for this process to recede even further into the shadows. The industry will collect data in a way that will be hidden from the public, and based on this, the Department proposes to make a new decision on how to protect participants' rights to a reasonable process in the adjudication of the disability benefits. How such an endeavor can be fair defies explanation. Indeed, it seems designed to permit an unscientific massaging of facts to favor one set of interests over another. There is no way that participants can effectively comment or provide their own "study," since they are not in possession of the data and could not muster the resources to process it, even if they were.

I do not assume that the industry is correct in estimating that premiums for group disability benefits would increase by 5-8%. (While it may be predictable that premiums would rise in Vermont in response to a mental health parity statute, it is less clear that enhanced process-based rules would have a fraction of that effect.) But to the extent that premiums would have to be increased to avoid illusory coverage, ERISA participants would welcome this. And marginally higher premiums would present no additional burden to public programs, since employee benefits that are impossible to obtain create the identical burden to no employee benefits at all. To put it more plainly, if the difference in premiums is the difference between paying something for nothing and paying something for something, the industry argument rings hollow. To the extent the Department thinks a delay is needed to prevent such an increase, this needs to be reconsidered, as the costs will not outweigh the benefits even in the worse case scenario.

I ask that the effective date of the regulations not be delayed, since the reason for doing so lacks the necessary transparency required by the Administrative Procedures Act and undermines the sense of trust and fairness that should inhere in this rule-making process.

Thank you considering my comments,

Sally Mermelstein
Attorney at Law