From: Susan Grabarsky
Sent: Monday, December 11, 2017 10:35 PM
To: EBSA, E-ORI - EBSA
Subject: RIN 1210-AB39

December 11, 2017

VIA EMAIL ONLY: e-ORI@dol.gov
Office of Regulations and Interpretations,
Employee Benefits Security Administration
U.S. Dept. of Labor
200 Constitution Avenue NW
Washington DC 20210

Re: Re-Examination of Claims Procedure Regulations for Plans Providing Disability Benefits
RIN No.: 1210-AB39

Dear Deputy Assistant Secretary Hauser,

We are attorneys who represent claimants and their beneficiaries in employee welfare benefit matters. We have evaluated, litigated, and resolved many thousands of ERISA disability insurance cases over the past 25 years. Our practice includes all states of ERISA claims issues: at the claim level, appeals of adverse claim decisions, litigation in the district court, and at the court of appeals.

We previously wrote to request that the Secretary of Labor not delay the effective date of the Final ERISA Claims Regulations ("Final Rules") adopted on December 19, 2016. Thank you for the opportunity to comment further on this matter.

We have read the comments submitted by insurance industry representatives against the backdrop of the full text of the Final Rules adopted one year ago. It appears the industry representatives are re-arguing the same objections which the DOL carefully considered prior to adopting the Final Rules. They have not offered any new information, which was not available prior to the adoption of the Final Rule, to justify violating the requirements of the Administrative Procedures Act (APA) of 1946 (5 U.S.C. §551 et seq.). These late objectors are seeking to undo the Final Rules after the fact, in a manner that lacks transparency and undermines the sense of trust and fairness that should be inherent in the rule-making process.

Notably, the industry argues if the Final Rules go into effect there will be an increase in costs that will increase premiums, ultimately resulting in less access to disability benefits for the American worker. This argument was made in various industry comments to the proposed rules before adoption of the Final Rules one year ago. The industry had ample opportunity to provide data supporting their argument prior to the adoption of the Final Rules – and they did. The Department properly considered the data and concluded that the purported increase in costs would not outweigh the

benefits. 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).

The Department has asked for additional data addressing whether costs increased, resulting in less access to disability benefits, in response to the last set of rules applying to ERISA disability plans that became effective in 2002. Data from the Bureau of Labor Statistics shows that instead of decreased access, participation in employer-based disability insurance actually *increased* following those changes and has *continued to increase steadily* between 1999 and 2014. https://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm.

This steady increase in access to disability insurance occurred despite numerous court decisions since 2002 addressing conflicted decision-making, deemed exhaustion, the need to discuss and explain adverse benefits decisions, the participant's right to respond to new evidence, and the need to explain the basis for disagreement with Social Security decisions. As you know, these are the same principles codified in the Final Rules. The BLS data shows that whether they increased costs or not, *they did not decrease access to disability benefits*; indeed, the opposite was found.

The Department has also asked for data about whether disability premiums increased and employee access decreased in response to the adoption of statutory bans on discretionary language clauses in disability policies by some states. 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). Whether or not costs rose after implementation of these statutory bans, according to the BLS data *worker access and participation in disability plans continued to increase*.

Further, during the period covered by the BLS data, 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. Many of the claims handling reforms required by these Regulatory Settlement Agreements go even further than the principles codified in the Final Rules. Yet even during this period, according to BLS data, *access and participation increased*.

Based on the foregoing, we respectfully dispute any claim that employee access to disability insurance plans will decrease in response to the codification in the Final Rules of the principles set forth in the case law, state discretionary clause bans, and Regulatory Settlement Agreements. Accordingly, we are 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.

Sincerely,

DarrasLaw

/s/ Frank N. Darras
/s/ Susan B. Grabarsky
/s/ Phillip S. Bather
/s/ Heather Gardner

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