

October 27, 2017

Submitted electronically via e-ORI@dol.gov

Mr. Timothy Hauser
Acting Assistant Secretary of Labor
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Claims Procedure for Plans Providing Disability Benefits; Extension of Applicability Date (RIN 1210-AB39)

Dear Acting Assistant Secretary Hauser:

We welcome the opportunity to comment on the proposed delay (“Proposed Delay”) of the applicability date of the rule amending disability claims procedures (81 Fed Reg. 92316 (Dec. 16, 2016), the “Regulation”) under the Employee Retirement Income Security Act of 1974 (“ERISA”). As discussed in more detail below, we strongly support delaying the applicability date of the Regulation for a period sufficient to allow the Department to consider the effects of the Regulation and any necessary changes. Not only does a 90-day delay provide insufficient time for insurance carriers and employers to implement changes to comply with the Regulation, but we also do not believe the Proposed Delay will provide sufficient time for the Department to review comments and data provided by stakeholders, determine next steps, and issue a proposed final rule consistent with the requirements of the Administrative Procedure Act.

I. Disability Insurance

Disability insurance provides working Americans with crucial income protection from unexpected disability due to illness or injury. Access to disability insurance depends on affordability, which is directly affected by regulatory, administrative, and litigation costs. Employers voluntarily provide disability insurance plans, and they are extremely sensitive to policy cost increases. Additionally, recent data indicates that workers typically underestimate their risk of incurring a disabling illness or injury and go without the income protection they need. This means that the benefits of any additional burdens placed on the voluntary employer system must clearly outweigh the costs.

II. Impact of the Regulation

The Regulation would likely cause significantly greater administrative burdens on employers and carriers, resulting in an expected increase in costs of providing disability income protection.¹ For example, the Regulation –

- Complicates the processing of disability benefits by imposing new steps and evidentiary burdens in the adjudication of claims, and forcing plans to consider disability standards and definitions different from those of the plan;
- Imposes these new complications without allowing any additional time in which to consider the claim and explain the ultimate decision to the claimant;
- Explicitly tilts the balance in court cases against plans and insurers, undoing a statutory and regulatory scheme that has worked for decades; and
- Creates perverse incentives for plaintiffs’ attorneys to side-step established procedures and clog the courts for a resolution of benefit claims.

We also anticipate that the Regulation will negatively impact consumers. For example, the “new rationale” on appeal requirement shortens the amount of time most consumers will have to appeal a new rationale for denying their claim, which consequently may deprive them of the right to obtain a full and fair review. Additionally, consumers who file suit under the new exhaustion of administrative remedies provision likely will wait longer for the court to adjudicate their claim, which in many instances may result in the remand of their claim back to the claim administrator.

III. Flawed Economic Analysis

The economic analysis accompanying the Regulation was incomplete and failed to adequately consider the true cost of the Regulation.² In fact, the Department recognized that it lacked key data necessary to conduct a thorough quantitative cost-benefit analysis of the Regulation. When the Department did attempt to conduct a quantitative analysis, it woefully underestimated the actual costs of the Regulation. For example, the analysis concluded that the Regulation would impose \$3 million of additional costs in the aggregate and across all plans. This flawed number was arrived at by estimating, for example, that office staff would spend a mere five minutes collecting and distributing additional evidence during the appeals process. In another example, the Department estimated that plans would be able to deliver claims communications via electronic notices to 75 percent of claimants, many of whom, by nature of their claim, either are not at their place of work or do not have the technology at home to handle communications in this fashion.

¹ See, e.g., Comment letters by America’s Health Insurance Plans, The NFL Player Disability & Neurocognitive Benefit Plan, Sun Life Financial, and Unum Group, Inc. dated January 19, 2016.

² See, e.g., Comment letters from the American Council of Life Insurers and American Benefits Council dated January 19, 2016.

IV. Failure to Demonstrate Need

The Regulation is particularly problematic because the Department failed to demonstrate that there are existing problems associated with disability claims adjudication that require regulatory action. Disability insurance claims procedures are highly regulated by many state and federal consumer protection provisions, and disability claimants already have a full and fair claims review process that balances the rights of claimants with the need for operational and cost efficiency. Despite the existing consumer protections, the Department elected to apply elements of the Affordable Care Act claims procedures to disability plans, inconsistent with the Congressional intent behind the Affordable Care Act and ERISA.³ The Regulation is also inconsistent with the Department’s long-standing guidance distinguishing disability and medical claims procedures.

V. Necessity of Delayed Applicability Date

It is necessary to delay the applicability date of the Regulation to avoid an unnecessary increase in costs to consumers. A delay will provide the Department with additional time to review the Regulation and take appropriate steps to address the risks inherent when increasing the cost of worker benefits, including possibly rescinding the Regulation.

The Department should delay the applicability date for a period sufficient to allow a full and fair review of the Regulation. In that regard, 90 days is insufficient. The Department has committed to reviewing and possibly rescinding or revising the Regulation based on new information provided by stakeholders. Historically, it has taken the Department months, if not years, to review existing regulations, propose changes, and issue final rules. It is unlikely that the Department will have finalized its review of the Regulation by the end of the Proposed Delay. Importantly, employers and carriers will need months to take the steps necessary to implement the Regulation consistent with any delay or modification, including hiring additional staff and updating policies and procedures.

* * *

In conclusion, we strongly support delaying the applicability date of the Regulation for a period sufficient to allow the Department to consider the effects of the Regulation and any necessary changes. In that regard, we do not believe the proposed 90-day delay will provide sufficient time for the Department to review comments and data provided by stakeholders, determine next steps, and issue a proposed final rule consistent with the requirements of the Administrative Procedure Act. We further support the Department’s review of the true costs of the Regulation and expect to submit additional information for the Department’s consideration.

³ Congress specifically intended for ERISA to “to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.” *Conkright v. Frommert*, 559 U.S. 506 (2010) (quoting *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996)).

We appreciate the opportunity to comment on the Proposed Delay and would be pleased to discuss this issue in more detail.

Sincerely,

American Benefits Council

American Council of Life Insurers

America's Health Insurance Plans

Cigna

The ERISA Industry Committee

Financial Services Roundtable

The Guardian Life Insurance Company of America

The Hartford

MetLife

Mutual of Omaha

National Association of Insurance and Financial Advisors

National Business Group on Health

NFL Player Disability and Neurocognitive Benefit Plan

Sun Life Financial

Unum Group, Inc.

U.S. Chamber of Commerce