



WRMarketplace

An AALU Washington Report

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The *AALU WR Newswire* and *WR Marketplace* are published by the AALU as part of the *Essential Wisdom Series*, the trusted source of actionable technical and marketplace knowledge for AALU members—the nation’s most advanced life insurance professionals.

Thursday, 1 March 2018

#WRM 18-09

TOPIC: Heads Up: DOL’s New Disability Claims Procedure Rules Go Into Effect Soon.

MARKET TREND: Plan participants will soon have additional protections against the improper denial of claims for disability benefits.

SYNOPSIS: The Department of Labor (“DOL”) has published regulations that enhance plan participants’ rights in the context of benefit claim denials and appeals. Effective for disability benefit claims filed on or after April 1, 2018, the final regulations require: (1) enhanced content for benefit denial notices; (2) expanded rights for appeals decisions based on new information; (3) policies that ensure that claims adjudicators and medical and vocational experts are free from conflicts of interest; (4) expedited availability of judicial remedies when claims procedures are not followed; (5) rights to appeal rescissions of coverage; and (6) preparation of claims and appeals decisions in a culturally and linguistically appropriate manner.

TAKE AWAYS: Employers maintaining plans that provide participants with disability benefits should (1) assess which plans are subject to the new claims procedure regulations, (2) review plan documentation and operation to ensure compliance, making any needed modifications, and (3) consider modifying definitions of disability in non-income replacement plans to fall outside of the scope of the final regulations.

MAJOR REFERENCE: 29 CFR Part 2560 "Claims Procedure for Plans Providing Disability Benefits."

In December 2016, the DOL published final regulations intended to enhance the claims process and procedures relating to disability benefits. After some delay, the DOL has recently announced that these final regulations will take effect for claims filed ***on or after April 1, 2018.***

OVERVIEW

The final regulations generally affect the procedures for filing disability claims, notifying participants of adverse benefits decisions, and the process of appealing claim denials. The new regulations ***apply to all plans that provide benefits contingent upon a participant's being determined to be disabled.*** Thus, they apply to traditional short-term and long-term disability plans that provide income replacement benefits but also may apply to qualified retirement plans and nonqualified deferred compensation plans that provide for additional benefits, the vesting of benefits, or the commencement of the payment of benefits upon a participant's becoming disabled.

The new rules only apply, however, if the plan fiduciary makes a determination of the participant's status as disabled. Arrangements that rely on a third-party's determination of disability, such as a determination made by the Social Security Administration or the employer's long-term disability plan provider, are not within the purview of these final regulations.

WHAT IS REQUIRED

Enhanced Content of Benefit Denial Notices. The final regulations now require that a denial of a claim for disability benefits contain, among other things, the following information:

- An explanation of the rationale for not accepting the views of health care professionals or vocational experts presented by the participant or whose advice was obtained on behalf of the plan or a determination of disability made by the Social Security Administration;
- If the denial is based on a limitation relating to medical necessity, experimental treatment, or a similar exclusion or limit, an explanation of the scientific or clinical basis for the denial, or a statement that such an explanation will be provided upon request at no charge;
- A statement informing the participant of the right to receive, upon request and at no charge, reasonable access to, and copies of, the entire claim file and other relevant documents;

- A statement of the internal rules, guidelines, protocols, standards, or other similar criteria of the plan that were used (or a statement that none were used) in denying the claim; and
- A description of the contractual limitations periods applicable under the plan to the participant's right to bring an action to enforce a claim and the date by which the participant must commence any such action.

Rights with Respect to New Information. Under the final regulation, a plan may not deny a participant's appeal of a benefit claim on the basis of any new information or rationale, unless the participant is given notice and a fair opportunity to respond.

Independence and Impartiality. Plans must ensure that disability claims are adjudicated without any conflict of interest. Accordingly, a claims adjudicator or medical or vocational expert may not be hired, promoted, terminated, or compensated on the basis of the likelihood of the person denying benefit claims.

Deemed Exhaustion of Claims and Appeal Processes. If a plan fails to adhere to all requirements under the final regulations (other than as the result of a minor error), the participant will be deemed to have exhausted his administrative remedies and can then file suit against the plan. The court will not be required to defer to the plan fiduciary's decision. If the court denies the participant's request for review, the participant must be allowed to refile the claim or appeal with the plan.

Rescissions of Coverage. A rescission of coverage that has a retroactive effect and does not arise from a participant's non-payment of premiums is treated as an adverse benefit determination. Accordingly, the participant will be entitled to engage in the plan's appeal procedures.

Culturally and Linguistically Appropriate Notices. Benefit denial notices must be provided in a culturally and linguistically appropriate manner. Specifically, if the participant resides in a county in which 10% or more of the population is literate only in the same non-English language, benefit denial notices must include a prominent statement in the relevant non-English language about the availability of language services. In such a case, the plan also must provide oral customer assistance in the non-English language upon request, including answering questions and providing assistance with filing claims and appeals in the non-English language.

WHAT SHOULD EMPLOYERS DO NOW

The following are appropriate action items for employers to consider implementing to ensure compliance with the final regulation.

Inventory Plans. Employers should identify which of their plans are subject to these new regulations. In particular, employers should ascertain whether they have any plans other than traditional income-replacement programs that provide benefits, vesting of

benefits, or commencement of payment of benefits upon the determination of disability that is made independently under that plan rather than by reference to a third-party's determination of disability (*most notably, retirement and deferred compensation plans*).

Review Materials of Plans Subject to the Final Regulation. Plan documents, summary plan descriptions, claims and appeals administrative practices and procedures, contracts with claims adjudicators and medical and vocational experts, and disability claims and appeals notices should all be reviewed to determine whether they comply with the final regulation.

Modify Plan Materials as Necessary or Appropriate. Non-compliant plan documents should be updated to bring them into compliance. In addition, if a plan (other than a traditional income replacement disability plan) uses a definition of disability that is independent and is administered separately for that plan, *the sponsoring employer should consider revising the definition to refer to the receipt of disability benefits from the Social Security Administration or under the employer's long-term disability plan to take that plan out of the purview of the final disability claim procedure regulation.*

TAKE AWAYS

Employers maintaining plans that provide participants with disability benefits should (1) assess which plans are subject to the new claims procedure regulations, (2) review plan documentation and operation to ensure compliance, making any needed modifications, and (3) consider modifying definitions of disability in non-income replacement plans to fall outside of the scope of the final regulations.

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