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January 19, 2016

Employee Benefits Security Administration

Re: RIN 1210-AB39

Dear Assistant Secretary Borzi:

I am an attorney. For nearly 30 years I have represented hundreds of clients who found it necessary to make a claim for private disability insurance benefits. Over this time, an increasingly greater portion of my clients' claims are governed by ERISA. My substantial experience in disputes over entitlement to these benefits has taught me that there are stark differences in the outcomes of disability insurance claims governed by ERISA and those governed by state law.

The simple fact is that in every state in which I have handled claims, state law is fundamentally more fair, more balanced and easier for a claimant to navigate than ERISA claims. I will also admit that while I have substantial experience in the handling of ERISA matters, even for an experienced attorney, ERISA is daunting, complex and loaded with pitfalls for the unwary.

The proposed regulatory revisions will be helpful for claimants and their representatives. Allowing claimants sufficient time to respond to "new" evidence or a "new rationale" asserted by the plan administrator is critical. There also can be little doubt that clear, well communicated deadlines will be an improvement. It is essential that claimants know the date after which their claim or internal appeal will be time barred. Indeed, these deadlines should be required to be communicated repeatedly to claimants, many of whom suffer mild to moderate cognitive problems and are easily confused.

I. Claimants should have at least 90 days to respond to "new evidence" or a "new rationale" asserted by plan administrators.

As a practical matter, a claimant confronted with new evidence may need time to return to her treating doctor, undergo new diagnostic testing, consult a vocational expert, collect statements from co-workers, supervisors, family members and the like. Doctors are busy. Appointments can be weeks away. Diagnostic testing only occurs long after being prescribed by a physician. Follow-up doctor visits are required to discuss the testing results with the patient/claimant. Insured plans, however, have readily available medical personnel whose job it is to help satisfy the agenda of the insurance company, who, after all, pays the medical personnel's salary.

Allowing claimants 90 days to rebut purported new evidence is devoid of prejudice to the plan. Denying a reasonable 90 day period to claimants is likely substantially prejudicial to the claimant. This is true not only for the internal appeal, but perhaps more so later when the administrative file is reviewed by a court. It is imperative that claimants be afforded a full opportunity to "make their record."

II. Claimants should be clearly notified of the date of expiration of their internal appeal opportunity and the running of any limitations period for the filing of a civil action.

No reasonable person would argue against this proposition. Fairness dictates the giving of fundamental information. The date the clock runs out is fundamental. ERISA was supposed to be simple enough that a claimant would not feel the need to hire an attorney, yet for unrepresented claimants, it is quite likely that they will not appreciate the importance of a limitations period, or if they perceived the approach of such a deadline would have no idea where to find the information. It would be painless for the plans to be required to clearly state the date of limitations periods, and the importance of the running of limitations.

The minimum limitations period to file a civil action should be at least 2 years after the internal appeal has concluded. To allow a shorter time is unreasonable and unfair. Again, the plans will suffer no meaningful prejudice by allowing a minimum 2 year period, yet the claimants will be substantially prejudiced with any shorter period. It takes time to find a lawyer experienced in ERISA disability matters, obtain the necessary records, evaluate the situation, communicate with interested parties and potential witnesses, etc. I have seen many, many circumstances where uninformed claimants tried to handle their claims themselves only to end up with an incomplete record. The typical claimant has no idea how to properly prepare an internal appeal. Plans, plan administrators and insurance companies provide scant information, if any as to just what is needed to perfect a claim or an appeal, as they take an adversarial position from the outset of a claim.

III. The absence of meaningful sanctions against plans, plan administrators and insurance companies in ERISA governed disability claims compels regulations which facilitate full and fair review.

Florida law, as contrasted with ERISA, affords meaningful protections to insureds as Florida law mandates an award of attorney fees to a successful insured who was caused to file a civil action against her own insurance carrier. Fla. Stat. 627.428. This statute acts as a powerful incentive to the insurance industry to make correct claim decisions. ERISA attorney fee awards are discretionary with the court, often resulting in no award despite the claimant having prevailed in the litigation. The absence of a mandatory attorney fee award in ERISA matters also causes lawyers to decline cases that they would have handled if they were assured of an award of fees if successful. I admit to having declined countless small benefit ERISA matters for this reason. I know many of my colleagues have done the same.

Just as important is the absence of any extra-contractual sanction for reckless or deliberate misconduct in the handling of ERISA disability claims. Again, under Florida law, Fla. Stat. 624.155, an insured may invoke a statutory protocol to be able to file a civil action based on the failure of the insurance company to act in good faith toward the insured with due regard for the insureds' interests. I can attest to having handled a number of non-ERISA matters involving deplorable conduct on the part of the insurance company which ultimately concluded with my client recovering not only the benefits at issue, but additional compensation paid by the insurance company. The availability of statutory sanctions is a very powerful tool to rein in insurance company personnel who have become jaded, spiteful and deceitful.

I appreciate the opportunity to offer some comments on some of the proposed regulations. Please feel free to contact me at any time with questions or requests. Thank you.

Sincerely,

/S/ John J. Spiegel

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