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# Preparing for 2018: The New ERISA Regulations for Disability Claims and Appeals

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## What is ERISA?

- ◆ Employee Retirement Income Security Act (ERISA).
- ◆ Covers retirement and welfare benefit plans, including disability plans.
- ◆ Protects employee benefit plan participants and beneficiaries.
- ◆ Establishes standards of conduct for plan administrators and fiduciaries.
- ◆ Requires plan sponsors to provide plan information.

## What is ERISA?

- ◆ ERISA vs. Non-ERISA Plans; disability plans exempt from ERISA if benefits are paid:
  - as a normal payroll practice;
  - from the employer's general assets;
  - without employee contribution;
  - without using insurance or a separate fund;
  - only to currently employed employees, not retirees, dependents, etc.

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## What is ERISA?

- ◆ ERISA is enforced by 3 agencies:
  - Department of Labor's (DOL's) Employee Benefits Security Administration (EBSA).
  - Treasury Department's Internal Revenue Service (IRS).
  - Pension Benefit Guaranty Corporation.

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## ERISA's Requirement Regarding Claims Handling

- Section 503 of ERISA requires every employee benefit plan to:
  - provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied,
  - denial must set forth specific reasons for such denial,
  - denial must be written in a manner calculated to be understood by the participant, and
  - must afford a reasonable opportunity to any participant whose claim has been denied a full and fair review of the decision denying the claim.

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## ERISA Claims Regulations

- ◆ ERISA has had in place for decades detailed regulations that govern disability plans and in general require:
  - A reasonable claims procedure:
    - cannot require more than two appeals;
    - may permit voluntary appeals, if certain requirements met;
    - cannot inhibit or hamper start of claim process (i.e. a fee);
    - must permit authorized representative to help claimant (i.e., a family member or lawyer).
  - Claim processing timeframes.
  - Certain information in adverse benefit determination.
  - Full and fair review, including the opportunity to submit comments and documents.
  - Access to copies of documents, records, and information, free of charge.

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# REGULATORY CHANGES

Applies to disability claims filed on or after  
January 1, 2018

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## Regulatory Changes To Claims Procedures

- ◆ Purpose of ERISA's 2017 regulatory changes include:
  - Conforming process for disability claims and appeals to those applicable to group health plans under ACA.
  - Protecting against conflicts of interests.
  - Increasing transparency.
  - Ensuring plan participants have fair opportunity to respond to evidence and reasoning behind claim decision.
  - Giving claimants ability to have full record in front of court when reviewing plan administrator's decision.

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## Conflicts of Interest

- ◆ Claims and appeals must be decided independently and impartially, meaning that those who decide claims should not be incentivized to deny claims.
- ◆ Some examples of prohibited conduct include:
  - Providing bonuses to claims adjudicators based on number of denials they make.
  - Contracting with medical expert based on his or her reputation for outcomes in contested cases.

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## Benefit Denial Notice/Adverse Decision

- ◆ Denial letters must now include the following:
  - An explanation as to why the plan administrator did not agree with the views of health care and vocational professionals.
    - Example from preamble: There is no disagreement to explain if a treating health care consultant expresses a view only on a diagnosis or treatment which the plan fully accepts in evaluating the question of whether the claimant meets the definition of a disability under the plan. Rather, the plan would be under the same obligation that exists under the current regulation to explain why it reached the conclusion that the diagnosed illness or treatment did not impair the claimant's work skills or ability to work or otherwise failed to satisfy the plan's definition of disability.
  - An explanation as to why the plan administrator did not agree with disability determinations made by the Social Security Administration.

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## Benefit Denial Notice/Adverse Decision

- ◆ New, additional requirements for denial letters:
  - If denial was based on exclusions or limits (such as medical necessity or experimental treatment).
    - Explanation of the scientific or clinical judgment for the determination, applying terms of the plan to claimant's medical circumstances, or
    - Statement that such explanation will be provided free of charge upon request.
  - Notice about claimants' rights to access their claim file and other relevant documents free of charge.
    - Relevant documents include documents, records, or other information that constitute a statement of policy or guidance concerning the denied benefit, without regard to whether such advice or statement was relied upon. This could include commissioned studies, surveys, or assessments that implicate a denied treatment option or benefit but do not relate specifically to the plan itself.
  - Any internal rules, guidelines or other similar criteria relied upon in deciding the claim. If no such internal rule or guideline exists, the letter must state that fact.
    - DOL's position is that these internal documents constitute instruments under which a plan is established or operated.

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## Denials On Appeal

- ◆ Before appeal can be denied, claimant must be provided (free of charge) any new or additional evidence considered, relied upon, or generated in connection with claim. Must be provided as soon as possible and sufficiently in advance of date on which appeal response is due to give claimant opportunity to respond.
- ◆ Before appeal can be denied based on new or additional rationale, claimants must be given notice and fair opportunity to respond. Rationale must be provided as soon as possible and sufficiently in advance of date on which appeal response is due.
- ◆ Appeal denial letters must contain the same information as initial denial letters.
- ◆ Appeal denial letters must describe any applicable plan imposed limitations period on filing a lawsuit, and date limitations period expires.

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## Consequences If Plan Does Not Process Claim Or Retroactively Rescinds

- ◆ Claimants are not barred from suing due to failure to exhaust the plan's claims procedures where plan failed to comply with claims procedures.
- ◆ Claim is *deemed denied* (which could lead to a more stringent standard of review by a court).
  - Does not apply to de minimis violations that do not cause prejudice or harm to the claimant, if plan can demonstrate that violation (i) was for good cause or beyond its control, (ii) occurred in the context of an ongoing, good faith exchange of information between the plan and the claimant, and (iii) is not part of a pattern or practice of violations by the plan.
  - Plan must provide explanation of violation to claimant within 10 days (if requested).
- ◆ Retroactive rescission: is considered an adverse benefit determination triggering appeal rights.

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## Non-English Language Notices

- ◆ Denial letters (both initial denials and denials on appeal) must be culturally and linguistically appropriate.
- ◆ If claimant's address is in a county where 10% or more of population is literate only in same non-English language, such letters must include prominent statement in that language about availability of language services.
- ◆ Plan must provide a copy of applicable letter or notice in that language upon request, and it must provide oral language services.

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## TIME TO REVIEW AND UPDATE PLANS AND PLAN ADMINISTRATION

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### Update Plan Document

- ◆ ERISA Disability plan document should include these elements:
  - Description of benefits provided.
  - Who is eligible to participate, e.g., classes of employees, employment waiting period, and hours per week.
  - Effective date of participation, e.g., next day or first of month following satisfaction of eligibility waiting period.
  - How much participant must pay towards cost of coverage.
  - Name of Plan Administrator.
  - Designation of any named fiduciaries other than Plan Administrator (e.g., claims administrator).
  - Procedure for deciding benefit appeals.
  - Standard of review for benefit decisions (e.g., plan administrator is authorized to interpret the plan and make determinations).
  - Plan sponsor's amendment and termination rights and procedures, and what happens to plan assets, if any, in the event of plan termination.

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## Update Plan Document (Cont'd)

- ◆ ERISA Disability plan document should include these elements:
  - Subrogation, coordination of benefits, and offset provisions.
  - Procedures for allocating and designating administrative duties to a TPA or committee.
  - How the plan is funded (whether from employer and/or employee contributions), only if it has assets.
  - How are insurer refunds (e.g., dividends, demutualization) allocated to participants.

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## Review and Update Plans and Plan Procedures/Administration

- ◆ Does plan require SSDI filing?
- ◆ Does plan have exclusion for experimental treatment or similar limitation?
- ◆ Review IME and peer review provisions.
- ◆ Review any references to other guidelines, processes, or procedures.
- ◆ Consider statement in plan regarding:
  - Right to receive documents relevant to claim denials.
  - Right to review and respond to new information during appeal in the event of adverse benefit decision.
  - Language translation services.
- ◆ Create clear communications regarding claims limitations period for adverse appeals decision letters.

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## Review and Update Plans and Plan Procedures/Administration

- ◆ Adverse benefit/denial notifications.
- ◆ Internal rules, guidelines, protocol, etc.
- ◆ Appeals process.
- ◆ Appeals notifications.
- ◆ Ensure language translation ability.
- ◆ Service and vendor contracts.

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**DESIGNER DEFENSES: PLAN  
CHANGES YOU CAN MAKE TODAY  
TO AVOID/LIMIT AN ERISA CLAIM  
TOMORROW**

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## Designer Defenses

1. Limitations.
2. Venue/forum selection.
3. Anti-assignment language.
4. Equitable lien by agreement/ recoupment language.
5. Reservation of rights/anti-lifetime vesting.
6. Indemnification.
7. Inoculation language.

## Designer Defense #1: Limitations

- ◆ *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604 (2013):
  - The plan's 3 yr limitation period was enforceable, even if limitations period for breach of contract was shorter than applicable state statute of limitations.
  - A plan limitations period should be enforced so long as it is reasonable.
- ◆ Cases since *Heimeshoff* have interpreted plan limitations provisions as short as 2 years as “reasonable.”
- ◆ Also consider adding “anti-tolling” language that the fiduciary statute of limitations is not tolled by the filing of an administrative claim.

## Designer Defense # 2: Venue/Forum Selection

- ◆ *Smith v. AEGON Cos. Pension Plan*, 769 F.3d 922 (6th Cir. 2014), *cert. denied*, Jan. 11, 2016.
  - Venue-selection clauses in ERISA plans are valid and enforceable (for now).
- ◆ Ensure that clause is in both plan and SPD.
- ◆ Language should provide that selected forum is the exclusive venue for any claim “relating to or arising under” plan.

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## Designer Defense # 3: Anti-Assignment Language

- ◆ Courts uniformly recognize the enforceability of anti-assignment clauses in plans.
- ◆ Very useful to defend claims against the plan brought by out of network providers via participant assignment.
- ◆ Sample language: “No claim, including, but not limited to, coverage, benefits (including, without limitation, payment for services), breach of fiduciary duty, and/or penalties, is assignable by any plan participant without the written consent of the Plan.”

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## Designer Defense #4: Plan Recoupment Language

- ◆ Plans need to be vigilant, and be ready to file suit quickly to prevent dissipation of the settlement funds, or SSDI lump sums owed to LTD carriers.
- ◆ Plans should review plan language and reimbursement agreements to make sure they clearly state the rights and responsibilities of the parties.
- ◆ If Plan believes that funds are being dissipated, consider filing action for an injunction from further dissipation of funds and determine if dissipated funds are traceable.
- ◆ Ethical obligations of attorneys who transfer funds to their clients which are properly owed to third parties. *See, e.g.,* ABA Model Rule, 1.15.

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## Plan Recoupment Language - Takeaways

- ◆ Consider including penalty provisions to plan:
  - Failure to timely notify plan of any claim or settlement which may implicate reimbursement provision; or
  - Failure to reimburse plan:
    - Will result in immediate termination of any additional benefits and forfeiture of participant status and all rights under plan.
    - May not be permissible for health plans.
    - Should be able to be used for disability, pension, and life insurance plans.
  - Add language entitling plan to recover attorney's fees and costs associated with any action necessary to recover overpayment that is withheld contrary to terms of plan.

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## Plan Recoupment Language - Takeaways

- ◆ Participant as fiduciary?
  - ERISA § 3(21) - “a person is a fiduciary with respect to a plan to extent (i) he ... exercises any authority or control respecting management or disposition of its assets”;
  - ERISA § 502(a)(2) – Provides for an action by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under ERISA § 409.
  - *Int'l Painters & Allied Trades Indus. Pension Fund v. Aragonas*, 643 F. Supp. 2d 1329, 1336-37 (M.D. Fla. 2008)
    - finding that defendant was a fiduciary where she refused to return ERISA funds upon notice of overpayment.

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## Designer Defense #5: Reservation of Rights

- ◆ Welfare plan benefits do not vest unless Plan expressly indicates that they do.
- ◆ Plan should indicate that unless expressly provided for, no participant vesting occurs in welfare plan benefit.
- ◆ Plan should contain language that clearly reserves right to change Plan and benefits at any time.

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## Designer Defense #6: Indemnification

- ◆ Plan Sponsors should review contracts with third party service providers.
- ◆ They sometimes contain onerous indemnification provisions.
- ◆ Review whether and to what extent plan documents contain indemnification provisions to fiduciaries.

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## Designer Defense #7: Inoculation Language

- ◆ Misclassification cases under ERISA:
  - Employer classifies/reclassifies workers as independent contractors or part-time workers.
  - Plaintiff claims employer made classification decision to prevent plaintiff from participating in benefit plans.
  - Typically brought as both FLSA and ERISA claim for benefits, Section 510, breach of fiduciary duty, and/or equitable relief claim.

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## Designer Defense #7: Inoculation Language

- ◆ Even if plaintiff is found to have been misclassified, plan language which expressly excludes independent contractors, even if subsequently reclassified as common law employee, can be a defense to an ERISA claim.
  - *Curran v. Fedex Ground Package System, Inc.*, 593 F. Supp. 2d 341, 344 (D. Mass. 2009) (“It is not the case that employees are necessarily participants in a plan,” as employers do not have to make the plans available to all employees.)
  - *Oplchenski v. Parfums Givenchy, Inc.*, No. 05-CV-6105 (N.D. Ill. Feb. 19, 2009) (“The critical issue for determining whether or not a worker is entitled to benefits under ERISA plans is how the plans define eligible employees.”)

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## “Inoculation” Language - Takeaways

- ◆ Plan documents should exclude independent contractors, leased workers, and any worker who might be determined to be a common law employee by IRS, other governmental agency, or court, from definition of employee eligible to participate in benefits.
- ◆ State that if even if reclassified by one of those agencies, benefits available only on prospective basis
- ◆ Ensure plans properly reserve discretion to plan administrator to interpret plan on this issue.

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## Credit Information

SHRM Code: **17-2SFKY**

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All those seeking CLE credit **must complete the program evaluation**. On the evaluation, you will be asked to provide your state bar admissions/bar numbers and the attendance affirmation code that was issued during this webinar.



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## Resources

- ◆ Reedgroup.com/blog:  
<https://reedgroup.com/2016/12/21/breaking-news-dol-issues-new-erisa-regulations-regarding-disability-plan-administration/>
- ◆ Regs: <https://www.gpo.gov/fdsys/pkg/FR-2016-12-19/pdf/2016-30070.pdf>
- ◆ Fact Sheet:  
<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/programs-and-initiatives/outreach-and-education/hbec/CAGHDP.pdf>

# THANK YOU

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