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General Comment

Re: Claims Procedure Regulations for Plans Providing Disability Beneifts
RIN No. 1210-AB39
Regulation: 29 C.F.R. sec. 2560.503-1

Deputy Assistant Secretary Hauser:

I have been representing employees wrongfully denied ERISA benefits for almost twenty years in Arizona District Court, the United States Court of Appeals for the Ninth and Tenth Circuits, and the U.S. Supreme Court (technically, I defeated a petition for certoriari). I have worked hard to have ERISA interpreted and applied in a manner consist with Congress's stated purpose of promoting the interests of employees.

The Department finalized rules after a 60-day notice and comment period that generated numerous comments from various stakeholders, including industry organizations, insurers, and plans, all of who came out in force. Some of them speculated that implementing the rules would have associated costs, but offered no evidence or data to support their speculation. Many in the industry requested additional time to adjust to the new rules, which the Department accommodated by significantly delaying the effective date.

The situation now appears to be that information that was not provided during the notice and comment period will be considered. Considering information outside of the notice and comment period deprives employees and their representatives of an opportunity to address these new concerns because no information is being made available. There is no reason to believe that information gathered in a post-comment period could not have been timely provided or that it is inherently more valuable than the timely collected information. Two things are clear. The new regulations come closer to fulfilling Congress's goal of promoting the interests of employees. And, the industry representatives, unhappy with that result, asked for a do-over in meetings with certain members of Congress, the full content of which have not been disclosed. Apparently citing a "confidential" study that predicts increased premiums, the industry has prevailed in getting a do-over, with such a short notice and comment period, that it is not even possible to obtain information under FOIA to learn who or what influenced the do-over decision.

Worse still, the industry proposes to make new changes to the regulation based on data that will be shielded from public scrutiny. Without access to the new "study" or an opportunity to comment, protecting employees' rights in such a process is impossible. The proposed delay for implementing the final regulations raises serious issues regarding transparency in the rule-making process.

That premiums would increase is speculative, but even if true, if higher premiums avoided illusory coverage, employees would likely welcome them. I am skeptical that the industry is concerned with additional "costs" that it can pass on to employees in the form of higher premiums. It is far more likely that the industry is concerned with its profits. Affording more protection to employees might result in more claims being paid, which cannot be offset by higher premiums, because higher premiums may drive clients away shrinking the risk pool. The Department should not be implementing regulations to protect industry profits. It should be implementing regulations that fulfill Congress' purpose of protecting the rights of employees.

The effective date of the regulations should not be delayed because the reasons for a delay have been screened from the public eroding the public's trust and the inherent

fairness that should attend the rule-making process. The new regulations provide marginally better protection to employees, which is consistent with Congress's purpose. Any delay will thwart that purpose.

Thank you,