

July 1, 2015
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Regulation Identifier Number: RIN 1210-AB32 (Fiduciary Rule)

Dear Secretary Perez:

Thank you for the opportunity to comment the proposed changes to Fiduciary Rule under ERISA. Please note the first two paragraphs are quotes from the Federal Register to properly set the background.

“ERISA (or the “Act”) is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in the Act’s imposition of stringent fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.

Under this statutory framework, the determination of who is a “fiduciary” is of central importance. Many of ERISA’s and the Code’s protections, duties, and liabilities hinge on fiduciary status. In relevant part, section 3(21)(A) of ERISA provides that a person is a fiduciary with respect to a plan to the extent he or she (i) exercises any discretionary authority or discretionary control with respect to management of such plan or exercises any authority or control with respect to management or disposition of its assets; (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so; or, (iii) has any discretionary authority or discretionary responsibility in the administration of such plan. “

Based upon the above: ERISA law includes the integrity of employee benefit plans as well as the security of retirement plans. Further inside of the heading of “employee benefit plans” are disability plans.

Clearly both retirement plans and disability plans have Fiduciaries exercising “discretionary authority” over the plan.

For example in a disability plan the company is providing assets to an insurance company to act as a Fiduciary to use the assets in the plan to cover partial salary should an employee become disabled.

While under a pension/401k plan the company is providing assets to a pension/401k plan that is administered by a Fiduciary with the plan assets used to cover a portion of the employees retirement costs.

Yet most ERISA Fiduciary rules in the Law and in the amendment only seem to apply to retirement type of Fiduciary duties. Why?

As President Obama said February 23, 2015 “ It’s very simple principle: You want to give financial advice, you’ve got to put your client’s interest first”

It is sad to me to see individuals who are covered under ERISA disability plans and become disabled being treated like they are in a third world country due to the “special rules” in ERISA for disability claims.

To quote Mr. William Parsons “ERISA was designed and implemented as a shield to protect employees. In reality, it has been used as a sword by insurance companies against the employees they proclaim to insure.”

“ERISA imposes ‘fiduciary’ responsibilities on anyone who exercises final decision-making authority over plan benefits. Unfortunately, under ERISA law, ‘fiduciary duty’ means little. The main problem is that the way the courts have construed ERISA, nothing prohibits ERISA fiduciaries from operating under a ‘conflict of interest.’ As stated above, under the most basic concepts of trust law, a fiduciary's interest is not supposed to conflict with that of the ‘beneficiary.’”

“Since many claimants are unwilling or unable to ‘go the distance’ in fighting their insurance plans, some unscrupulous insurance companies are assured of winning the war under ERISA, even if they lose a battle here and there. No matter how egregious an insurance company's conduct, ERISA provides it with a virtual license to steal. This absolutely removes any incentive an insurance company might otherwise have to treat the claimant fairly.” (Note: quotes are from a Q&A on ERISA law provided by Michael A. McKuin).

In America there must be laws to make sure the insurance companies act like the Fiduciaries they are. Surely in Federal Court the Judge can award punitive or other types of damages against the Fiduciary insurance company for frivolously denying the claim, operating in BAD FAITH as a fiduciary, missing all policy deadlines, cherry picking evidence, or even committing fraud to ensure the Fiduciary violation is not repeated over and over again.

The short answer is NO.

Under ERISA law the most the Federal Judge can award is the amount of disability benefits per the policy, maybe interest costs and maybe a discretionary award of partial attorney fees.

Clearly the Fiduciary has a strong conflict of interest and a financial incentive to deny the claim.
How is this putting your client's interest first?

It may take two to five years in the court system even if the employee wins to collect the very benefit that was set up by the employer through a Fiduciary to prevent the employee from going into poverty should he/she become disabled. In addition, the employee must prove in Federal Court that the Fiduciary insurance company acted arbitrary and capriciously. Yes you read that correctly: the burden is on the EMPLOYEE to prove that the Fiduciary acted arbitrarily and capriciously in their decision to deny the Employee disability coverage under the plan. Indeed the Employee is assumed guilty unless he/she can PROVE beyond a reasonable doubt otherwise.

Many Judges have expressed major concern over the law in their rulings. See Radford Trust v. First Unum Life Insurance Company of America, 321 F.Supp.2d 226 (D. Mass. 2004). Chief US District Judge William Young stated—among other concerns—that "Although the profit motive drives companies toward efficiency, it creates a substantial risk that they will cut costs by denying valid claims."

Where else can a Fiduciary put their interests ahead of the Americans they represent and improve their own profits by denying claims with NO potential for penalty?

In closing while I wish you would review the entire disability benefit section under ERISA law to bring it into the 21st Century.

At a minimum PLEASE allow ERISA Law to treat the Fiduciary insurance companies of disability plans like the Fiduciaries they are by requiring that they place the employees interest first, and including appropriate penalties for violating their fiduciary duties (operating in bad faith, egregious conduct, frivolous denial of a claim, etc).

I am sure the original intent of the ERISA law passed by Congress was to help protect employees, not to give the disability plan Fiduciary the power to put their interest ahead of the America employees and improve their own profits by denying valid claims!

Sincerely

Dennis R. Axelson

Retired CEO

Electronic signature by Dennis R Axelson July 2, 2015.