

# American Federation of Labor and Congress of Industrial Organizations



815 Sixteenth Street, N.W.  
Washington, D.C. 20006  
(202) 637-5000  
www.aflcio.org

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Submitted electronically to [e-ORI@dol.gov](mailto:e-ORI@dol.gov)

January 19, 2016

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Attention: Claims Procedure Regulation Amendment  
for Plans Providing Disability Benefits

Re: Claims Procedure for Plans Providing Disability Benefits  
RIN 1210-AB39  
Docket ID: EBSA-2015-0017-0001

Ladies and Gentlemen:

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is pleased to submit these comments on the Notice Proposed Rulemaking on Claims Procedure for Plans Providing Disability Benefits ("NPRM" or "Proposed Rule") issued by the Department of Labor ("Department").<sup>1</sup>

The AFL-CIO is a voluntary, democratic federation of 56 national and international labor unions that represent 12.2 million working people. We work every day to improve the lives of people who work for a living. We help people who want to join together in unions so they can bargain collectively with their employers for fair pay and working conditions and the best way to get a good job done. Our core mission is to ensure that working people are treated fairly and with respect, that their hard work is rewarded and that their workplaces are safe. We also provide an

<sup>1</sup> The NPRM, published in the Federal Register on November 18, 2015 (80 Fed. Reg. 72014), is available at <https://www.gpo.gov/fdsys/pkg/FR-2015-11-18/pdf/2015-29295.pdf>.

independent voice in politics and legislation for working women and men, and make their voices heard in corporate boardrooms and the financial system.

Working people, through collective bargaining and other advocacy for improved pay and benefits, have placed a significant emphasis on income security—whether due to an interruption of work due to injury or illness, temporary or permanent job loss or retirement. In the private sector, 64 percent of represented workers participate in short-term disability plans while only 37 of non-represented workers do.<sup>2</sup> Four-in-five private sector union workers participate in a retirement plan at work, compared to fewer than half of non-union workers. Two-thirds of private-sector union workers participate in a defined benefit pension plan, compared to just one-in-10 non-union workers.<sup>3</sup> For represented workers, disability benefits are provided through both single employer and multiemployer plans, and they may be insured or self-funded.

The AFL-CIO supports the Department’s proposed changes to the claims procedure for plans providing disability benefits. The Proposed Rule enhances the protections afforded participants when benefit claims are denied and requires plans, particularly those using life and disability insurance issuers to provide benefits, to give detailed information and explanations to participants as benefit claims are processed.<sup>4</sup>

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<sup>2</sup> U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2015*, Bulletin 2782 (Sept. 2015) t. 16, “Insurance Benefits: Access, Participation, and Take-up Rates, Private Industry Workers, National Compensation Survey, March 2015” available at <http://www.bls.gov/ncs/ebs/benefits/2015/ebb10057.pdf>. Worker participation in both short-term and long-term disability benefit coverage is lower than other workplace benefits. In the private sector, only 39 percent of all workers participate in short-term disability benefits and 33 percent do so with respect to long-term disability benefits. The participation rate differential for long-term disability benefits between represented and non-represented workers is only 4 percentage points, significantly smaller than that for short-term disability benefits. One possible explanation is that represented workers continue to have access to disability retirement benefits through defined benefit pension plans. See U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, “*Defined Benefit Plans: Availability of Selected Benefit Features, Private Industry Workers, National Compensation Survey, 2014*” Bulletin 2781 (Apr. 2015), t. 26 available at <http://www.bls.gov/ncs/ebs/detailedprovisions/2014/ownership/private/table26a.pdf>.

<sup>3</sup> U.S. Dept. of Labor, U.S. Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in the United States, March 2015*, Bulletin 2782 (Sept. 2015) t. 2, “Retirement Benefits: Access, Participation, and Take-up Rates, Private Industry Workers, National Compensation Survey, March 2015” available at <http://www.bls.gov/ncs/ebs/benefits/2015/ebb10057.pdf>.

<sup>4</sup> As the Department notes in the preamble to the Proposed Rule, “disability cases dominate the ERISA litigation landscape today.” 80 Fed. Reg. 72016 (footnote omitted). The proposed changes are intended, in part, to reverse the adverse impact of various decisions under the current claims procedure rules.

### Overview of the Proposed Rule

The proposed changes to the long-standing claims procedure rules<sup>5</sup> for plans providing disability benefits essentially apply the enhanced participant protections and additional requirements for health care claims included in Section 2719 of the Public Health Service Act and the final regulations implementing its provisions.<sup>6</sup> These changes build on the existing requirements of the Section 503 Regulations and assure that disability benefit claims—whether the benefits are provided through a welfare benefit plan or a pension benefit plan—will be accorded the same protections afforded health benefit claims.<sup>7</sup>

The Proposed Rule in paragraph (b)(7) strengthens the current independence standards by including new criteria that prevent decisionmaker conflicts of interest. The expanded disclosure requirements in proposed paragraph (g)(1)(v) will provide participants with a better understanding of the reason for any initial benefit denial, inform them of any plan rules and guidelines forming the basis for the decision and notify them of their right to request and review, at no charge, all relevant documents. These enhanced disclosures, combined with the proposed right to review and respond to additional information developed during an appeal set forth in proposed paragraph (h)(4), work together to offer participants a full internal review, taking into account all relevant information available to both plans and participants. In addition, by requiring adverse benefit determinations to be provided in a culturally and linguistically appropriate manner,<sup>8</sup> the Department assures that individuals who are not fluent in English will be able to understand the disposition of their claim and their rights for review.

The Proposed Rule, in paragraph (l)(2), modifies the deemed exhaustion provisions of the Section 503 Regulation by establishing a strict adherence requirement with an exception for minor errors. The Department also clarifies that if a participant pursues remedies under ERISA Section 502(a) in the absence of a reasonable claims procedure, then no deference should be

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<sup>5</sup> The NPRM refers to the existing claims procedure rules as “the Section 503 Regulations” (80 Fed.Reg. 72015) and these comments do the same.

<sup>6</sup> The Affordable Care Act added Section 2719 to the Public Health Service Act (“PHSA”) and incorporated its provisions, as well as other required changes affecting group health plans, into the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) through the addition of ERISA Section 715(a)(1). The Department, together with the Departments of Treasury and Health and Human Services issued final regulations implementing Section 2719 and the other applicable provisions of the Affordable Care Act on the same day the NPRM was published. *See* Final Rules for Grandfathered Plans, Preexisting Conditions Exclusions, Lifetime and Annual Limits, Rescissions, Dependent Coverage, Appeals and Patient Protections Under the Affordable Care Act, 80 Fed. Reg. 72192 (November 18, 2015) available at <https://www.gpo.gov/fdsys/pkg/FR-2015-11-18/pdf/2015-29294.pdf>.

<sup>7</sup> The PHSA Section 2719 requirements and the final rule implementing them (“2719 Final Rule”) do not apply to plans grandfathered under Section 1251 of the Affordable Care Act. 80 Fed. Reg. 72016. The Proposed Rule, however, applies to all plans providing disability benefits and does not consider any plan to be “grandfathered.”

<sup>8</sup> Proposed paragraphs (g)(1)(viii) and (p).

accorded to the plan's decision and the court should use de novo review.

The Proposed Rule also amends the definition of "adverse benefit determination" in paragraph (m)(4) to include the rescission of disability coverage and the proposed definition assures that any rescission will be subject to the review by the plan.

#### The Proposed Technical Correction Should Be Adopted

The Department proposes a technical correction "to clarify that the extended time frames for deciding disability claims, provided by the quarterly meeting rule ... are applicable only to multiemployer plans."<sup>9</sup> We support the intended purpose of the proposed technical correction, but we are concerned that the language of the correction as proposed may result in some confusion. Proposed paragraph (i)(3)(i) changes the cross-reference to the generally applicable timing rules from paragraph (i)(1) to paragraph (i)(1)(i). However, paragraph (i)(1)(i) itself incorporates the quarterly meeting rule exception in paragraph (i)(1)(ii) which is not limited to multiemployer plans, the problem the Department seeks to fix.

#### The Final Notice Should Include Information on Any Contractual Statute of Limitations

The Department asks whether the final notice of adverse benefit determination should include "a clear and prominent statement of any applicable contractual limitations period and its expiration date for the claim at issue ...."<sup>10</sup>

At a minimum, the final notice should notify participants of the existence of an applicable contractual limitations period and direct them where it can be found in the governing plan documents, as well as explain that copies of the relevant documents will be provided upon request and at no charge.

In our view, as plans choose to establish their own contractual limitations periods, the better approach is for the final notice to include a statement of the applicable period and its expiration. Omitting this information could render the requirement that the notice advise participants of their right to bring an action under ERISA Section 502(a) meaningless, particularly if participants are unaware of any applicable contractual limitations period.

#### The Final Rule Should Include the Definition of Disability Benefit

In the preamble, the Department notes that "[a] benefit is a disability benefit, subject to the special rules for disability claims ..., if the plan conditions its availability ... upon a showing of disability."<sup>11</sup> The source of the definition is FAQ A-9, one of the FAQs accompanying the

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<sup>9</sup> 80 Fed. Reg. 72019.

<sup>10</sup> 80 Fed. Reg. 72020.

<sup>11</sup> 80 Fed. Reg. 72016, fn. 4.

issuance of the Section 503 Regulation when it was issued in 2000.<sup>12</sup>

We suggest that the definition of disability benefit be added to paragraph (m). Even though there may be no dispute among stakeholders of what constitutes a “disability benefit,” it would be beneficial to include the accepted definition in the text of the rule, rather than relying, as the Department itself did, on an FAQ issued 15 years ago.

#### The Final Rule Should Not Include Disability Determinations Made by Third Parties

FAQ A-9 defining disability benefit also included a clarification about the scope of the special rules governing the claims procedure for disability benefits included in the Section 503 Regulations. The Department stated that

... if a plan provides a benefit the availability of which is conditioned on a finding of disability, and that finding is made by a party other than plan for purposes other than making a benefit determination under the plan, then the special rules for disability claims need not be applied to a claim for such benefits. For example, if a pension plan provides that pension benefits shall be paid to a person who has been determined to be disabled by the Social Security Administration or under the employer’s long term disability plan, a claim for pension benefits based on the prior determination that the claimant is disabled would be subject to the regulation’s procedural rules for pension claims, not disability claims.

In our view, the same principle should continue to apply, and the final rule should include this clarification of the scope of the disability benefits claims procedure. As we noted with respect to the disability benefit definition, it would be beneficial to all stakeholders to include the clarification in the text of the rule, rather than relying on an older FAQ.

We appreciate the opportunity to submit these comments on the Proposed Rule and should you have any questions about these comments or need any additional information, please do not hesitate to contact us.

Sincerely,

/s/ Karin S. Feldman  
Karin S. Feldman  
Benefits & Social Insurance Policy Specialist

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<sup>12</sup> FAQs About The Benefit Claims Procedure Regulation, A-9 available at [http://www.dol.gov/ebsa/faqs/faq\\_claims\\_proc\\_reg.html](http://www.dol.gov/ebsa/faqs/faq_claims_proc_reg.html).