

## Insights

### New Disability Claims Final Regulations - Effective April 1st!

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The Department of Labor (DOL) expanded the claims procedures for disability benefits in final regulations issued on December 19, 2016 with a delayed effective date of April 1, 2018 ("Final Regulations"). The Final Regulations expand the current claims procedures applicable to disability claims pursuant to benefit plans subject to the Employment Retirement Income Security Act of 1974 ("ERISA"). The DOL hopes the enhanced transparency requirements and the new procedural safeguards for participants seeking disability benefits provided by the Final Regulations will reduce litigation associated with disability benefit determinations.

On November 24, 2017 the DOL delayed the original effective date of January 1, 2018 to April 1, 2018 to provide the DOL time to seek and review comments as to whether the Final Regulations should be rescinded. The DOL received and reviewed numerous comments seeking the rescission of the new regulations, but, ultimately, determined that the arguments were not persuasive, thus finalizing the regulations effective April 1, 2018.

#### ***Which benefit plans are affected by the Final Regulations?***

Any ERISA plan that provides for disability benefits, including qualified retirement plans and non-qualified deferred compensation plans that offer disability retirement benefits may be affected. Disability benefits provided in a retirement plan or deferred compensation plan may include accelerated vesting, waiver of allocation or accrual requirements for purposes of receiving an employer contribution, and acceleration of the timing of a distribution when a participant terminates due to disability. However, these regulations apply only if the plan administrator makes the determination of whether or not an individual is disabled or has any discretion in such determination (rather than the determination being made by the Social Security Administration or a third-party insurer).

#### ***What are the new requirements under the Final Regulations?***

Below are highlights of the new requirements.

- New review processes which ensure independence and impartiality of decision-makers, including the removal of any incentives for decision-makers to benefit from a denial of benefits.
- Adverse benefit determinations related to disability benefits must now include:
  - a discussion of the decision (which would include an explanation of the basis for disagreeing or not following the view of health care or vocational professionals or a determination made by the Social Security

Administration);

- an explanation of the scientific or clinical judgment for the determination, applying the plan terms to the specific medical circumstances, or a statement that such an explanation will be provided, upon request, free of charge (if the determination is based on a medical necessity or experimental treatment or similar exclusion or limits);
- an explanation of specific internal rules, guidelines, protocols, standards or other similar criteria the plan relied on when making the determination or a statement that such rules do not exist; and
- a statement that the claimant is entitled to receive, upon request and free of charge, reasonable access to all copies of all documents, records or other information relevant to the claimant's claim for benefits.
- Claimants must be provided a reasonable opportunity to review and respond to new or additional (1) evidence considered or (2) rationales, that are relied upon, or generated by the plan prior to the date of the adverse benefit determination.
- Explanations must be clearly communicated to claimants regarding (1) voluntary appeal procedures, and (2) any applicable contract limitations period, that applies to the claimant's right to bring such an action.
- Notifications to participants must be made in a culturally and linguistically appropriate manner.

### ***What should employers do by April 1, 2018 to comply with the Final Regulations?***

1. Determine which plans and deferred compensation arrangements of the employer will be directly impacted by the Final Regulations.
  - Is it an ERISA plan?
  - Does the plan administrator or committee have discretion to determine if the participant is disabled?
2. Determine whether to amend the plan to eliminate the plan administrator discretion or to keep the discretionary disability determination in the plan.
3. Work with the administrators (internal and/or external) to update operational processes related to ERISA plans that make disability determinations. The process updates should include changes to the review procedures and determination notices provided to participants.
4. Identify third parties that make disability determinations that are used by the employers' ERISA plan to provide disability benefits. If the identified third parties are in a contractual relationship with the employer, discuss how processes will be modified to comply with the Final Regulations. In addition, review any service agreements with the identified third parties to ensure the service provider is contractually required to comply with the Final Regulations.
5. Prepare plan amendments and updated summary plan descriptions to reflect the additional procedural steps required by the Final Regulations.

For more information please contact a member of the Krieg DeVault Employee Benefits Practice Group.